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No. 64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

FONG FOO AND ROBERT KNUPP,

Petitioners,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	1
STATUTES, CONSTITUTION, AND RULE INVOLVED	2
STATEMENT	4
The District Court Proceedings	5
The Court of Appeals	13
SUMMARY OF ARGUMENT	18
ARGUMENT	26
Introduction	26
I. To Try the Defendants in This Case Again Would Be to Put them "Twice in Jeopardy" in Violation of the Fifth Amendment	26
A. A Defendant Who Has Once Been in Jeopardy and Who Has Been Acquitted Cannot Be Tried Again, Irrespective of How Improper the Acquittal Might Have Been	26
B. Even if the Judgment of Acquittal Could Be Considered a Nullity, or Treated as an Order of Mistrial, the Defendants Could Not Constitutionally Be Tried Again	34
II. Congress Has Provided No Jurisdiction to Review Judgments of Acquittal, Either on Appeal or by Writ of Mandamus	42
III. The Trial Judge Did Not Exceed His Power in Rendering the Judgment of Acquittal	58
CONCLUSION	66

AUTHORITIES CITED

Cases:

Carroll v. United States, 354 U.S. 394 (1957) 23, 42, 45, 50-51
Cornero v. United States, 48 F. 2d 69 (9th Cir. 1931) 39

Page

Employers Reinsurance Corp. v. Bryant, 299 U.S. 374 (1937) ... 44
Gordon, Ex parte, 66 U.S. 503 (1862) ... 22, 45
Gori v. United States, 367 U.S. 364 (1961) ... 20-21, 39-41
Green v. United States, 355 U.S. 184 (1957) ... 28, 30, 33, 36-37
Interstate Commerce Commission v. United States, 289 U.S. 385 (1933) ... 44-45
Jencks v. United States, 353 U.S. 657 (1957) ... 25, 65
Johnson v. Zerbst, 304 U.S. 458 (1938) ... 19, 31
Johnston v. Marsh, 227 F. 2d 528 (3 Cir. 1955) ... 61
Kepner v. United States, 195 U.S. 100 (1904) ... 30, 37, 42
Kloeb v. Armour & Co., 311 U.S. 199 (1940) ... 44
Logan v. United States, 144 U.S. 263 (1892) ... 39
Matthew Addy Steamship & Commerce Corp., Ex parte, 256 U.S. 417 (1921) ... 44
McCardle, Ex parte, 74 U.S. (7 Wall.) 506 (1869) ... 42
McGuire v. United States, 152 F. 2d 577 (8 Cir. 1955) ... 25, 63
Mitchell v. Youell, 130 F. 2d 880 (4th Cir. 1942) ... 19, 31-32, 40
Pennsylvania Co., Ex parte, 137 U.S. 451 (1890) ... 22, 43-44
Regina v. Charlesworth, 5 L.T. 150 (Q.B. 1861) ... 38
Regina v. Duncan, 7 Q.B.D. 198 (1881) ... 27
Regina v. Justices of Antrim, [1895] 2 I.R. 603 (Q.B. Div.) ... 34
Regina v. Windsor, 10 Cox C.C. 276 (Q.B. 1865, Ex. Ch. 1866) ... 38
Rex v. Furser, Say. 89, 96 Eng. Rep. 813 (1753) ... 28
Rex v. Justices of Galway, [1906] 2 I.R. 499 (K.B. Div.) ... 34
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Rex v. Simpson, [1914] 1 K.B. 66 ... 33-34
Simmons v. United States, 142 U.S. 148 (1891) ... 39
Thompson v. United States, 155 U.S. 271 (1894) ... 39
United States v. Ball, 163 U.S. 662 (1896) ... 18, 29, 40
United States v. Bink, 74 F. Supp. 603 (D. Ore. 1947) ... 64
United States v. Dickinson, 213 U.S. 92 (1909) ... 50
United States v. Dietrich, 126 Fed. 676 (C.C.D. Neb. 1904) ... 63
United States, Ex parte, 242 U.S. 27 (1916) ... 15, 23, 54
United States, Ex parte, 287 U.S. 241 (1932) ... 15-16, 23, 54
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Page

United States v. Harriman, 130 F. Supp. 198 (S.D.N.Y.) *aff'd* 219 F. 2d 918 (2d Cir. 1955) 40
United States v. Heath, 260 F. 2d 623 (9th Cir. 1958) 60
United States v. Keitel, 211 U.S. 370 (1908) 49-50
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United States v. Mayer, 235 U.S. 55 (1914) 54
United States v. Pack, 247 F. 2d 168 (3 Cir. 1957) 53
United States v. Perez, 9 Wheat 579 (1824) 20, 38
United States v. Rice, 327 U.S. 742 (1946) 44
United States v. Sanges, 144 U.S. 310 (1892) 22, 46
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United States v. Smith, 331 U.S. 469 (1947) 54
United States v. Waters, 175 F. 2d 340 (D.C. Cir. 1948), dismissed on motion of Gov't 335 U.S. 869 (1948) 55-56
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United States v. Weissman, 266 U.S. 377 (1924) 24, 56-57, 59
United States v. Whitlow, 110 F. Supp. 871 (D.D.C. 1953) 39
Vaux's Case, 4 Co. Rep. 44 (1591) 28
Wade v. Hunter, 336 U.S. 684 (1949) 39

Constitution, Statutes & Rules:

U.S. Constitution Article III, § 1 42
U.S. Constitution Amendment 5 ..... 2, 18-21, 26-42
Act of February 6, 1889, 25 Stat. 656 ..... 22, 46, 53
Act of March 3, 1891, 26 Stat. 826 ..... 22, 46, 53
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Act of May 9, 1942, 56 Stat. 271 ..... 23, 52
Act of June 25, 1948, 62 Stat. 844 53
Act of May 24, 1949, 63 Stat. 97 53
18 U.S.C. § 371, 1001 4
18 U.S.C. § 3731 ..... 2-3, 55
28 U.S.C. § 1651 (a) 3-4, 21-23, 42-58
Rule 12, Fed. R. Crim. Proc. 52-53
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Rule 34, Fed. R. Crim. Proc. 55

Page

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88 Cong. Rec. 3892, 3949 (1942) 52

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BRIEF FOR PETITIONERS

OPINIONS BELOW

There was no formal opinion of the District Court. The opinion of the Court of Appeals (R. 45) is reported at 286 F. 2d 556.

JURISDICTION

The Judgment of the Court of Appeals was entered on February 2, 1961 (R. 65). On February 27, 1961, Mr. Justice Frankfurter extended the time for filing a petition for certiorari herein to and including March 15, 1961 (R. 66). The petition was filed on March 7, 1961, and granted on June 19, 1961 (R. 67-68). This Court has jurisdiction under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

On a petition for mandamus brought by the United States, the court of appeals reviewed the record of a criminal trial,

found that the trial judge "exceeded his power" in entering a judgment of acquittal, and ordered that the defendants be brought to trial again before another judge. The questions presented are:

1. Whether the double jeopardy clause of the Fifth Amendment protects the defendants against a second trial after they have been acquitted by a court of competent jurisdiction in proceedings free of fraud and collusion, irrespective of whether the trial judge exceeded his power in rendering the judgment of acquittal.

2. Whether the double jeopardy clause of the Fifth Amendment protects the defendants against a second trial even if the judgment of acquittal could be considered void and treated as if it had been an order of mistrial, since a mistrial order in the circumstances of this case would have been prejudicial to the defendants.

3. Whether a court of appeals has jurisdiction to review or set aside a judgment of acquittal on petition for mandamus.

4. Whether a trial judge has power to enter a judgment of acquittal before the prosecution has rested when he believes such action is warranted because of defects in the testimony already presented and because the prosecuting attorney has engaged in what the judge considers improper conduct.

STATUTES, CONSTITUTION, AND RULE INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

The statute describing the situations in which the Government may appeal in criminal cases, 18 U.S.C. § 3731, reads in pertinent part as follows:

> "An appeal may be taken by and on behalf of the

United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

"From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

"The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted."

* * * *

The "all writs" section of the Judicial Code, 28 U.S.C. § 1651 (a), upon which the court of appeals relied for jurisdiction to issue a writ of mandamus in this case, provides as follows:

"The Supreme Court and all courts established by

Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

* * * *

Rule 29 (a) of the Federal Rules of Criminal Procedure, dealing with motions for judgment of acquittal, provides as follows:

"Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right."

* * * *

STATEMENT

Fong Foo and Robert Knupp, petitioners herein, together with their employer, Standard Coil Products Co., Inc., petitioner in No. 65, were brought to trial before Judge Wyzanski of the United States District Court for the District of Massachusetts on an indictment charging them with having falsified and concealed, and conspired to falsify and conceal, material facts in a matter within the jurisdiction of a Government agency, in violation of 18 U.S.C. §§ 371, 1001 (R. 6). A jury was empaneled and sworn, and the Government began to present its case. On the eighth day of the trial, the judge, on motion of the defendants, entered a judgment of acquittal (R. 37).

On petition for mandamus filed by the Government, the United States Court of Appeals for the First Circuit set

aside the judgment of acquittal, and directed that the defendants be brought to trial again before another judge (R. 65). Petitioners were permitted to participate as intervenors in the mandamus proceeding, and have brought the case here on petitions for certiorari, which were granted by this Court on June 19, 1961 (R. 67, 68).

The District Court Proceedings

The offenses with which the defendants were charged related to the testing of "radiosondes," which Standard Coil produced for the Government. A radiosonde is a device which is used to gather weather data. When dropped by parachute from an airplane, it transmits radio signals which show the temperature, pressure, and humidity of the air through which the radiosonde passes.

The contracts under which these radiosondes were produced required Standard Coil to test samples, selected by a Government inspector, by recording on tape the signals produced by the radiosonde under specified test conditions. These tapes were then submitted to the inspector. The indictment alleged that the defendants conspired to falsify, and did falsify, certain of these tests, by recording the signals from the radiosondes not under the conditions called for by the inspector, but under whatever conditions would make the radiosonde produce the desired signals. It also alleged that the defendants concealed, and conspired to conceal, the manner in which these tests were conducted.

In his opening statement to the jury, the prosecuting attorney stated that the Government's case would consist of two parts.

> "The first part of it is explanatory. Before you can follow the testimony about the falsification of the tests you will have to know something about the instrument involved, how it was made and how it was to be tested . . ." (R. 70).

The second part, he explained, would show how the tests were falsified.

In accordance with this plan, the Government, after introducing certain documents in evidence, called as its first major witness Constanz Palliotto, the Government inspector who was responsible for supervising the inspection of radiosondes at the Standard Coil plant and analyzing the test data. His testimony covered the greater part of six days of trial. It dealt in great detail with the way radiosondes were produced, the way they operated, the testing procedures, the duties of the individual defendants and other employees, the respective roles of the Government inspectors and the company employees in the testing process, and other related matters.

Much of this testimony was highly technical, and difficult for a lay jury to follow. In order to assure that the jury would understand it, the judge occasionally reminded the witness that he was talking to untrained people, and that he should speak as if he were talking to an intelligent child (R. 102, 117, 165).

Also, when the judge felt that the witness' testimony was not sufficiently clear, he would attempt to elicit more simple explanations.

The witness' inability to express technical matters in laymen's terms was not the only problem presented by Palliotto's testimony, however. It also became apparent at an early stage that the witness had difficulty articulating even non-technical ideas. For example, he described an operation which made "spurious marks" on a piece of paper, by which he meant—as became clear on close questioning by the judge—marks made on the "spur of the moment" or instantaneously (R. 135-36). On another occasion, he used the term "virgin hair," by which he meant, it turned out, "hair that has not been subjected to dyes or any cosmetics" (R. 143).

While the latter incident was only humorous, the former,

as the judge realized, could be prejudicial in a trial where the offense charged is in the nature of fraud. For that reason the judge followed the witness' testimony closely, and insisted on precision at every step, in an attempt to avoid ambiguity which could be damaging to the defendants.

The trial judge repeatedly found it necessary to explain to the witness "the seriousness of the case in which you are testifying," and the disastrous consequences that might result from careless statements (R. 166, 313-14, 315, 328, 352, 398, 477).

At first, the judge was extremely patient with the witness. By the end of the second day, however, he began to show signs of exasperation. The witness had identified an exhibit as a document prepared by an agent of the company which turned out to be, in part, a Government inspector's worksheet. When this became evident, the judge granted a motion to strike, and ordered that "these misleading exhibits" be taken from the jury (R. 171). He then stated:

> "I am quite prepared to take drastic action in connection with this case. I think the best thing would be to give you a recess for the balance of the day, and on Monday come in at 10:00 o'clock, and if the case at that time, in connection with this technical matter, is not so prepared that I feel the jury is getting a fair picture I am not going to submit anybody to the risks of this kind of confusion in this very grave case in which the charge is that the defendants have confused the Government with false and misleading reports." (R. 172).

The pattern, however, remained the same. For example, the witness on Monday was asked whether he had made any notes of his daily activities for a certain period. He said he had had such notes, but had destroyed them "the last year or so." He was then asked whether he destroyed them after the indictment had been returned in January, 1960. His an-

swer: "No, before that sir." But when asked whether he had destroyed them after learning that there was a charge of wrongdoing against the defendants, he first answered "no," then, when pressed "It could have been, I'm not positive," and later when pressed further, "no" again. (R. 246-248).

On the following day, the trial judge raised this question again, and asked the witness what his testimony had been. The answer: "I don't remember exactly what I answered yesterday." Then he was asked, "what is the truth," and he said: "The answer would be yes; I would have to stick by that" (R. 351-52).

On the next day, however, the witness testified that he had not destroyed any notes relating to the radiosonde, and that he thought the prior questions had been directed to his business notes in general (R. 418-19).

Earlier on the same day, the witness had testified that he had destroyed certain test tapes, on which were recorded the signals produced by the radiosondes under the test conditions. He stated, however, that he had *not* destroyed any tapes after the FBI had begun its investigation, in September 1957. He was then asked whether he had been instrumental in instigating the FBI investigation, to which he answered "yes."

He said that he had given the FBI a written statement sometime in September, 1957, that he could not remember what time of the month, that it had been "within two or three weeks" after Labor Day, that the statement was in the form of a longhand letter, that he had no carbon copy, that he did not know whether he had written it in his office or his home, and that he had subsequently signed a statement prepared for him by the FBI.

The judge suggested to the prosecutor that he make an effort to get the original letter from the FBI. At that point, the witness suddenly changed his testimony, and said "I think at the first instance, I visited the FBI office with an-

other personnel from the Signal Supply Agency." He identified the "other personnel" as a Mr. Young. When asked again about the letter, he said he had not sent such a letter to the FBI at all. He also suddenly remembered, with great specificity, that he had visited the FBI "between the sixth and the ninth of September" and that he *had* destroyed test tapes subsequent to those dates (R. 353-58).

At this point, the judge dismissed the jury from the room, and suggested that the United States Attorney should *nol pros* the case, because of the way in which Palliotto's testimony had been going. He said that, in his view, there was "no chance whatsoever that this jury would convict these defendants if a conviction required any credit of Mr. Palliotto." Further, he said, "if in the end the jury did believe this witness, I think it would be also inevitable that I would have to set aside the verdict . . ." The United States Attorney objected to the suggestion on the ground that Palliotto was not testifying about the fraud, but only providing a foundation for the fraud testimony. But the impression created by Palliotto's testimony, the judge said, was ineradicable. And, as counsel for the corporate defendant pointed out, the Government had stated earlier in the trial that Palliotto was to be recalled to testify concerning the fraud, and it was only for this reason that defense counsel had not cross-examined him on that subject (R. 358-65).

Nevertheless, the United States Attorney elected to continue the trial.

In the middle of the seventh day, Palliotto concluded his testimony. The Government then called a witness by the name of Berne Fisher, who had once been an employee of Standard Coil and who testified briefly as to the organization of the company and the jobs held by the individual defendants and certain other employees (R. 481-500).

The next witness was Robert Rosenholm, who turned out to be the last witness the Government presented. He had been named as a co-conspirator in the indictment, although

he had not been indicted, and he identified himself as a former "final inspector" of radiosondes for Standard Coil.

After giving some general background testimony as to the nature of his former duties at Standard Coil, he began to testify concerning the alleged conspiracy. Like Palliotto, his testimony was, in part, self-contradictory (*Compare* R. 542-46 *with* R. 546-48).

At one point, he was asked about a conversation he had had with one Teichman, whom the witness identified as the company's lawyer. After first stating that he was "not sure" when this conversation took place, he stated that it was in 1958, and that he believed it was in February of that year (R. 552). When the witness was asked to relate the content of his conversation with Teichman, the matter of the attorney-client privilege was raised. At a bench conference, the prosecuting attorney explained that he intended to show that at this meeting Teichman was informed of what was "going on" with respect to the testing of radiosondes, that the company thereafter retained the employees participating in the alleged fraud, and that Teichman affirmatively attempted to conceal the facts. The court ruled that "if you prove that, I will let the conversation in, but I will not allow you to do it by hypothesis" (R. 553-57). A recess was called to permit counsel to prepare a proper foundation for the admission of the testimony (R. 558-59).

When the trial resumed on the following day, Rosenholm was again asked to give his recollection of the date when the conversation with the attorney occurred. At this time he gave the date of the conversation as September 1957 (R. 559).

On cross-examination, Rosenholm, after first saying that he couldn't recall what had taken place that morning before the trial, admitted that he had changed the date as a result of the discussion with the Assistant United States Attorney (R. 567).

The date of the conference was highly significant. The

indictment alleged that the conspiracy took place from September 1956 to November 1957. Thus, the testimony concerning the conversation with the company's attorney would be admissible only if it took place during that period.

The trial judge then excused the jury and the witness, and after expressing his belief that the prosecutor had violated an elementary rule (R. 569), suggested that the situation might be such as to require him to respond to a motion (R. 569-70). The Assistant United States Attorney said that the actual time of the conference was not a point on which the case swung (R. 571). The court pointed out, however, that he had recessed the trial for the very purpose of permitting the Government to lay a proper foundation, if one could be laid, with regard to the admission of the testimony which the Government claimed would show that there was a continuous conspiracy involving the attorneys, the officers of the corporation, and other conspirators, as well as the defendants (R. 571).

Counsel for the company then moved in the alternative for acquittal of the corporate defendant, or action by the court striking the testimony of the witness. Counsel for the individual defendants moved simply for a judgment of acquittal (R. 572).

The trial court recalled the jury, and after absolving the United States Attorney and his Assistants of any intention of acting wrongfully, reviewed the situation as he saw it (R. 572-75). There had already been, he said, witnesses who showed a "lamentable lack of awareness or lack of capacity in connection with their testimonial obligations" (R. 573). He described the present witness as one who had shown "either a lamentable lack of memory or an extraordinary power of inventiveness" in connection with a previous portion of his testimony (R. 575). He then concluded:

> "With due regard for the principles of justice under law, I must bear in mind not only what may be correct, but what is fair. In our constitutional system, under

our jurisprudence, many things which are true are not allowed to be shown. Examples are a confession extorted by physical coercion; such a confession is not admissible although it may be perfectly correct and the defendant may be guilty. Likewise, information procured by an unlawful search and seizure may be perfectly true and the defendant may be guilty; nonetheless it is well settled that no conviction can be based lawfully upon information unconstitutionally procured by an unreasonable search or seizure.

"These principles illustrate the sensitivity of American courts to fair play in connection with every aspect of the criminal law. It is not the duty of a court to see that every guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law.

"Bearing in mind these principles, and responding to the motions of acquittal made by counsel for the individual defendants and the corporate defendant, I direct you at this stage to return the verdicts of acquittal with respect to each of the individuals and with respect to the corporation.

* * * *

"The Court. The defendants will stand. (The defendants complied.) You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free" (R. 575-76).

On September 21, 1960, the following judgment was entered on the docket:

"The defendants, Standard Coil Products Co., Inc., Fong Foo, and Robert Knupp, having been set to the bar to be tried by a jury for the offenses of concealment of material facts and conspiring to conceal material

facts in a matter within the jurisdiction of an agency of the United States in violation of 18 U.S.C. 1001 and 371 as charged in 9 counts, and

"On September 20, 1960, upon the allowance of motions for acquittal made on behalf of each defendant, it is

"ORDERED that each defendant be, and hereby is, acquitted of the offenses charged, and it is

"FURTHER ORDERED that each defendant be, and hereby is, discharged" (R. 37).

On September 28, 1960, the Government filed, with the District Court, a motion to vacate the judgment of acquittal and for reassignment for trial. In that motion, the Government urged (1) that the court had no authority to acquit and discharge the defendants until the evidence to be presented by the Government was closed, and that the judgment which had been entered was therefore void, (2) that the legal effect of the order, given its maximum possible scope, "amounted to no more than the granting a motion for mistrial," and (3) that the grounds upon which the court relied were insufficient even to justify a mistrial (R. 38-39). The motion was denied.

The Court of Appeals

The Government then filed a petition for a writ of mandamus in the Court of Appeals for the First Circuit (R. 1-6). The petition set forth the grounds which had been urged in the District Court and prayed that the judgment of acquittal be vacated and the case be reassigned for trial. The defendants were permitted to intervene (R. 39-40). The Court, on February 2, 1961, issued its opinion and the writ which the Government had requested. Although not requested to do so, it directed that the case be reassigned by the District Court for trial before another judge.

The majority opinion, per Woodbury, Chief Judge, recited in detail the circumstances of the trial. It concluded

that it was not clear on the record whether the trial judge directed acquittal because he thought the testimony produced by the Government was fatally defective, or because he thought the action of the Assistant United States Attorney deprived the defendants of their rights. In either case, it held, his action was not only erroneous but "beyond his jurisdiction" (R. 50).

As to the first possible ground, the Court was extremely critical of the trial judge. Although acknowledging that the testimony of the two principal witnesses "was certainly confused and conflicting," it concluded that the confusion and conflicts were, at least in part, generated by the questions asked by the trial judge. The witnesses' memories, the Court of Appeals agreed, "were not entirely reliable" and "they were not masters of the English language," but the trial judge was required to accept the witnesses as they were and should not have engaged in sharp, persistent questioning which only succeeded in further confusing them and disrupting the Government's case (R. 51).

As to the second possible ground for the trial court's action, the Court of Appeals saw no conceivable basis for it. The Court conceded, although it specifically did not decide, that a judgment of acquittal "might be warranted in the event that deliberate misconduct of Government counsel is so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible" (R. 54 n. 5). It concluded, however, that the Assistant United States Attorney was not guilty of any misconduct or impropriety, and even if he had been the most the defendants would be entitled to in this case would be an order of mistrial (R. 54).

Having determined that the trial judge had erred, the court then turned to the question of whether it had power to correct the error. It conceded that, in view of the inability of the Government to appeal, error by the trial court in exercising its powers was not reviewable. The only possible basis

for action was exercise by the trial judge of a power he did not possess. The trial court clearly had power to order an acquittal, under Rule 29(a) of the Federal Rules of Criminal Procedure, after the Government had closed its case. And the Government conceded (although the Court of Appeals did not decide), that such an order might be entered before the close of the Government's case if it were clear that, irrespective of the evidence to be produced later, what had already transpired made a conviction impossible. This was not the situation here, the Court of Appeals concluded, and therefore it did not have to decide whether under any circumstances a trial judge had power to enter a judgment of acquittal prior to the close of the Government's case (R. 54-55).

The Court of Appeals proceeded to conclude, nevertheless, that under the circumstances of the present case the Court had no power to enter a judgment of acquittal and that mandamus was a proper remedy to correct the purported exercise of that power. The court based this conclusion on two cases, *Ex parte United State,* 242 U. S. 27 (1916), and *Ex parte United States,* 287 U. S. 241 (1932). In the first case, which the court conceded was not in point, this Court had held that a district judge had no power to suspend a mandatory sentence, and that mandamus would lie to require the judge to vacate the order of suspension. Primarily relied upon by the Court of Appeals was the observation by this Court, in that case, that if the legislative command fixing a specific punishment could be set aside it would follow that a trial judge could refuse to treat as criminal an act which the legislature had so designated (R. 55-56).

More nearly in point, the Court of Appeals said, was the second case entitled *Ex parte United States.* In that case this Court had issued a writ of mandamus directing a district judge to issue a bench warrant which he had refused to do despite the fact that an indictment had been returned by a properly constituted grand jury. That case, the Court of

Appeals said, established that the writ of mandamus was available in aid of its appellate jurisdiction and established "the necessity for issuing the writ" to confine trial judges within their jurisdictional limits (R. 56). Then, arguing by analogy, the court concluded that if a trial judge does not have the power to prevent the arrest of one properly accused of crime, or to refuse without valid reason to try a criminal charge, it followed that a trial judge had no power "arbitrarily to halt the trial of an accused when the government has only begun to present its evidence of guilt. We see no difference in principle between blocking a criminal trial at the threshold and blocking it when the government has barely had a chance to put its toe in the door" (R. 58).

Having thus decided that it had the power to set aside the judgment of acquittal, the court then addressed itself to the question of double jeopardy. It conceded that it would be pointless to issue the writ of mandamus if the plea of *autrefois acquit* would be available on a second trial. But, it concluded, since the trial judge had no power to enter a judgment of acquittal there would be no basis for a claim of double jeopardy (R. 58). (The difference, for double jeopardy purposes, between a first trial blocked "at the threshold" and one blocked after the Government had put it toe in the door" was not discussed by the court.)

Judge Aldrich, although concurring in the result, differed sharply from the reasoning set forth in the majority opinion. Unlike the majority, Judge Aldrich affirmatively held that a trial court did have authority to enter a judgment of acquittal at any stage at which a fatal deficiency in the Government's evidence appeared. That being so, he concluded, and the decision of the trial judge not being reviewable, it would follow that a judgment of acquittal, no matter how erroneous, on the basis of the trial judge's determination that there was a fatal deficiency in the Government's case could not be vacated by way of mandamus (R. 60-62).

The considerations were different, Judge Aldrich argued, with respect to the claim of misconduct by Government counsel. True, the trial court clearly had the power to determine that the conduct of counsel was improper, and the power so to determine necessarily included the power to determine erroneously.

But Judge Aldrich concluded that "what corrective steps the court should take after its determination of a procedural error is a separate question" (R. 62). Even assuming that the prosecutor had violated a rule of conduct in speaking to the witness, Judge Aldrich held that this misconduct did not justify an acquittal because it was "anything but deliberate," and it was not prejudicial to the defendants. Since the date was "a preliminary matter," its "present effect . . . upon the trial was nil. Its future effect was entirely in the control of the court, who could exclude any further evidence relating to this as yet undisclosed conference" (R. 63). Therefore Judge Aldrich concluded:

> "Under these circumstances I do not think that the court had any more power to order an acquittal than it would have had on the basis of some rule of thumb that more than three Government questions asked in good faith, but regarded by the court as irrelevant, had undoubtedly delayed the trial" (R. 63).

Under Judge Aldrich's view, it was critical to determine whether the trial judge had entered the judgment on the basis of his conclusion concerning the evidence or on his view as to Government counsel's misconduct. Concluding that the record showed that the judge had acted because of his belief, whether erroneous or not, that the Assistant United States Attorney had conducted himself improperly, he concurred in the conclusion of the court that the judgment of acquittal was beyond the trial judge's power, that it should be set aside, and that the defendants should be tried again (R. 64-65).

SUMMARY OF ARGUMENT

I

A. One of the most ancient and fundamental precepts of Anglo-American criminal law is the protection against being "twice put in jeopardy of life or limb." While this doctrine has in many respects changed and grown over the centuries, one basic rule has remained intact: once a defendant has been placed in jeopardy and acquitted, he cannot be tried again for the same offense.

At common law, there were three situations in which a plea of *autrefois acquit* would not bar a second trial: where the indictment at the first trial had been legally insufficient, where the court in which the first trial was held lacked jurisdiction, and where the acquittal was obtained by fraud or collusion. In all three, the reasoning was that the first trial was entirely void, in the sense that, no matter what happened during its course, there could not have been a valid conviction, and the defendant thus had not been in jeopardy. In *United States* v. *Ball,* 163 U. S. 662, 669 (1896), this Court refused to follow the common law rule in a case in which a defendant tried on an insufficient indictment had been acquitted by the jury. In the other two situations the rule is still generally followed, although no such case has ever been decided by this Court.

But we know of no case in which a defendant has been retried after having once been acquitted on a valid indictment, before a court of competent jurisdiction, in proceedings free from fraud or collusion. No matter how erroneous or irregular the acquittal is, the courts have consistently held that it is a bar to another trial.

The Government, and the court below, conceded that an erroneous acquittal would bar a second trial, but took the view that in granting the acquittal in this case the trial judge not only committed error, but exceeded his power.

This contention, even if correct, does not provide a basis for holding that the constitutional protection is not available to the defendants. The test is whether the defendants were in jeopardy of conviction when they were acquitted. The propriety of the acquittal itself is not relevant at all.

The single case relied upon by the court below, *Mitchell* v. *Youell,* 130 F.2d 880 (4th Cir. 1942), is inapposite. There the court, in setting aside a conviction on a writ of *habeas corpus* because the petitioner had been denied his constitutional right to counsel, stated that the petitioner could be tried again. Not only is that case distinguishable because it was a conviction, not an acquittal, which was set aside, but also, as this Court held in *Johnson* v. *Zerbst,* 304 U. S. 458, 468 (1938), the trial court, by depriving the defendant of his right to counsel, lost jurisdiction to proceed, and therefore the defendant was not in jeopardy.

A recent English case involving facts strikingly similar to those here, demonstrates that the sole test of whether an acquittal bars a second trial is whether at the first trial the defendant was in jeopardy of conviction. In *Rex* v. *Middlesex Justices ex parte Director of Public Prosecutions,* [1952] 2 All Eng. Rep. 312 (Q.B. Div), the trial judge had directed a verdict before any evidence had been introduced, on the ground that he had read the "depositions" and believed there was insufficient evidence to support a conviction. The court of Queens Bench refused to issue a writ of certiorari to set aside the acquittal, and rejected arguments similar to those made by the Government here. While the court criticized the trial judge in the strongest terms, it held that the defendants had been in jeopardy, and therefore could not be tried again.

B. The court below reasoned that if the judge lacked power to grant the judgment of acquittal, the judgment must be considered a nullity, and that it therefore could not bar a second trial. If the argument made above is correct,

the acquittal, even if beyond the judge's powers, cannot be considered a nullity for double jeopardy purposes.

But whether or not the acquittal is to be considered effective, the fact is that the judge terminated the trial, and a second trial would undeniably be a second jeopardy.

The attempt of the Government and the court below to treat the judge's order as a declaration of mistrial does not provide an answer, for even if the judge had declared a mistrial in the circumstances of this case, the defendants could not be tried again.

It must be remembered that the trial was going very well from the defendants' point of view. If the judge had declared a mistrial, it would not have been for the protection of the defendants, but for the benefit of the prosecutor. The sole effect of such action would have been to permit the prosecutor to repair the defects in its case at a second trial. This is precisely what the double-jeopardy protection was intended to prevent.

In the early English common law, a trial judge was not permitted to terminate a trial for any reason until a verdict had been rendered. In this country, this rule was abandoned in favor of a more practical and humane approach, under which the trial judge has discretion to declare a mistrial whenever such action is manifestly necessary or where it would serve the interests of justice. *United States* v. *Perez*, 9 Wheat. 579 (1824). It has always been understood, however, that if the trial judge declares a mistrial without sufficient justification or in circumstances in which such action is prejudicial to the defendants, the double jeopardy clause protects the defendants against a second trial.

The recent decision of this Court in *Gori* v. *United States*, 367 U. S. 364 (1961), bears out this analysis. In that case, the majority held that the defendant could be retried, although an earlier trial had ended in a mistrial ordered by the judge *sua sponte*, because the mistrial had been declared for the purpose of protecting the defendant. The dissent-

ing Justices believed that even this was not a sufficient justification, and that a mistrial ordered without the consent of the defendant must, in the absence of manifest necessity, bar a second prosecution. Thus, the Court seemed to be unanimously of the view that if a mistrial is ordered for reasons other than necessity or the protection of the accused, the defendant cannot be tried again.

The argument made by the Government below, that the defendants' motion for a judgment of acquittal was equivalent to consent to a mistrial, is plainly without merit. The fact is that defendants, when invited to make a motion, did not move for a mistrial. Moreover, they would have been foolhardy to do so, since the judge had stated it to be his opinion that no jury could possibly convict on the basis of the Government's testimony, and that if a conviction were returned he would probably set it aside.

Finally, even if it were possible to construct a theory on which it would have been proper for the judge to declare a mistrial in this case, the fact is he did not do so. In *Gori,* this Court held that the trial judge is vested with broad discretion in deciding whether or not to order a mistrial, and that he should make his decision in the light of all the circumstances known to him, including those which are not reflected in the record. Surely, the decision of the trial judge not to order a mistrial in this case is entitled to as much respect as the opposite decision of the trial judge in *Gori,* particularly since the record here shows no basis on which a mistrial could properly have been granted.

II

In order to sustain the action of the court below, it is necessary not only to overcome the constitutional difficulties discussed above, but to find some statutory basis for reviewing and setting aside a judgment of acquittal. The lower federal courts, after all, have only such jurisdiction as is given them by statute.

The court below conceded that there is no statute giving the Government the right to appeal from a judgment of acquittal, but held that it had jurisdiction to review such a judgment under the "all writs" provision of the Judicial Code, 28 U.S.C. § 1651(a).

It is an established principle that the "all writs" provision does not provide a basis for judicial review in situations where there is a clear Congressional hostility to such review. *E.g., Ex parte Pennsylvania Co.,* 137 U. S. 451 (1890). The history of Congressional treatment of review in criminal cases makes very clear that there is a manifest Congressional policy opposed to review of judgments of acquittal.

Until very late in the nineteenth century, neither party could appeal in any criminal cases, and this Court held that there was no jurisdiction in the federal court to issue prerogative writs in a criminal case. *Ex parte Gordon,* 66 U. S. 503 (1862). Since there has been no change in the "all writs" provision, the relevant inquiry here is whether subsequent legislation with respect to criminal appeals can be said to have indirectly had the effect of making the "all writs" provision a basis for jurisdiction to review a judgment of acquittal.

While Congress has subsequently given defendant a right of appeal, and in certain limited instances has given the Government that right as well, it has repeatedly and consistently manifested its hostility to any review of verdicts of acquittal.

The Acts of 1889 (25 Stat. 656) and 1891 (26 Stat. 826) were the first to provide appellate rights to defendants. In response to an argument that they also created jurisdiction to entertain appeals by the Government, this Court stated: "It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States." *United States* v. *Sanges,* 144 U. S. 310, 323 (1892).

Congress first provided for appeals by the Government in 1907 (34 Stat. 1246), but limited the appealable orders to enumerated types rendered prior to trial or after conviction. The legislative history demonstrates that Congress purposely excluded any review of judgments of acquittals, both for constitutional and general policy reasons.

The Government's right to review was not further extended until 1942, and then pursuant to a request by the Attorney General for certain limited additional grounds for appellate review. In making the request, the Attorney General was careful to state that "Such rights should, of course, be limited to cases in which there has not been a verdict in favor of the defendant, for in such an instance the rule against double jeopardy would conclusively bar the government against securing a review." H.R. Rep. No. 45, 77th Cong., 1st Sess. 2 (1941).

No subsequent Congressional action has in any manner modified this long-standing policy against review of judgments of acquittal. Each time Congress amended the criminal appeals statutes, "it did so with careful expression of the limited types of orders in criminal cases as to which the Government might thenceforth have review." *Carroll* v. *United States,* 354 U. S. 394, 402 n. 11 (1957).

While this Court has permitted the issuance of prerogative writs in certain situations, *e.g.,* to compel issuance of a bench warrant, *Ex parte United States,* 287 U. S. 241 (1932), or to prohibit suspension of a mandatory sentence after conviction, *Ex parte United States,* 242 U. S. 27 (1916), these cases all involved matters arising before trial or after conviction with respect to which there is no Congressional hostility to review. The error of the court of appeals in the present case was in applying such cases to a matter with respect to which there is manifest Congressional hostility to review: the judgment of acquittal.

III

If the arguments we have made above are correct, the court of appeals need never have reached the question of whether the trial judge had exceeded his power, and this court need not reach it. On the other hand, if, as we believe, the trial judge did not exceed his power, this in itself is a sufficient ground for reversing the decision below.

Since the power of a federal judge must be determined with reference to the federal statutes, the constitution, and the traditions of the common law, we believe that the arguments we have already made demonstrate that the power of a trial judge to acquit defendants who are properly before him is absolute.

This view, moreover, is supported by the few cases that have had occasion to deal with the question. Particularly significant is the decision of this Court in *United States* v. *Weissman,* 266 U. S. 377 (1924), which held that a judgment of acquittal based on a holding that the indictment was insufficient was effective as an acquittal, even though no evidence had been introduced, and even though the proper action would have been to quash the indictment. The language of the opinion clearly implies that the sole test of the judge's "power" is whether he had jurisdiction over the subject matter and the parties.

The danger that such broadly defined power might be abused is, we suggest, much less than the danger that any limitation on that power might render the court unable fully to protect the rights of the accused. After all, there are no limits on the "power" of a prosecutor to enter a *nol prosequi* in the interests of justice, the effect of which is precisely the same as an acquittal. Why should judges not be trusted with a similar power, since it is they, not the prosecutors, who are the ultimate guardians of our liberties?

But even if it is assumed that there are some limits on a

judge's power to acquit, it is clear that the court below, while it paid lip service to the distinction between "error" and "lack of power," set aside the judgment simply because it believed the judge had committed error. It did not hold that a judge could never grant an acquittal prior to the close of the prosecution's case, either because of the defectiveness of the evidence or because of misconduct by the prosecutor, but only that it was improper to do so in the circumstances of this case. We believe that in order to find that the judge exceeded his power, it is necessary to find not only that his action was improper on *this* record, but that it would have been improper on *any* record.

Thus, the critical questions which must be asked, if it is assumed that the judge's power to acquit is not unlimited, are precisely the ones the court avoided: may a judge acquit before the prosecutor has rested when he believes, however erroneously, that the evidence is fatally defective, and may he do so when he finds, however erroneously, that there has been misconduct by the prosecutor which in his judgment requires such action?

The answer to these questions, we submit, can only be yes. Surely a judge need not permit a trial to continue when the prosecution concedes a critical fact, See, *e.g., McGuire* v. *United States,* 152 F. 2d 577, 580 (8th Cir. 1945), or when he believes that the prosecutor by his own conduct has made a fair trial impossible. See *Jencks* v. *United States,* 353 U. S. 657 (1957). The fact that the court of appeals did not believe that the evidence in this case was fatally defective, or that the prosecutor's conduct was such as to require an acquittal, does not negate the trial judge's power to hold otherwise. The motions for a judgment of acquittal raised these issues and the judge decided them. While he may have decided them erroneously, he certainly cannot be said to have exceeded his power.

ARGUMENT

INTRODUCTION

In this case, for the first time in the history of federal jurisprudence, a court has set aside a judgment of acquittal in a criminal case and ordered that the defendants be retried. The court took this unprecedented action because, in its view, the trial judge exceeded his power in rendering the judgment, and that the judgment, therefore, had to be considered null and void.

We believe (1) that the court erred in concluding that the trial judge exceeded his power, (2) that the court lacked jurisdiction even to review the judgment, and (3) that the defendants' constitutional right not to be put "twice in jeopardy" precludes a second trial in any event. Each of these arguments individually, if sustained, would require reversal of the decision below.

Ordinarily, where there are both constitutional and non-constitutional grounds for reversal, it is sound practice for a court to examine the non-constitutional questions first, and to avoid the constitutional issues entirely if that is possible. It is therefore customary for counsel to present the arguments in that order. In this case, however, we believe an understanding of the historic protection against double jeopardy is essential to an understanding of the non-constitutional as well as the constitutional issues. Therefore, although we do not contend that it is necessary for the Court to decide this case on constitutional grounds, we must begin with a discussion of double jeopardy.

I—TO TRY THE DEFENDANTS IN THIS CASE AGAIN WOULD BE TO PUT THEM "TWICE IN JEOPARDY" IN VIOLATION OF THE FIFTH AMENDMENT

A. *A Defendant Who Has Once Been Placed in Jeopardy and Who Has Been Acquitted Cannot be Tried Again, Irrespective of How Improper the Acquittal Might Have Been.*

One of the most ancient and fundamental precepts in

Anglo-American criminal law is that which is embodied in the "double jeopardy" clause of the Fifth Amendment: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ." Like other common law doctrines, this one has developed and grown over the centuries, and its meaning today is not in all respects identical to its meaning in the time of Lord Coke, or even at the time the Constitution was adopted. One rule, however, has remained unchanged through the ages: Once a defendant has been acquitted, he cannot be tried again for the same offense.

> "The practice of the Courts has been settled for centuries, and is that in all cases of a criminal kind where a prisoner or defendant is in danger of imprisonment no new trial will be granted if the prisoner or defendant, having stood in that danger, has been acquitted." *Regina* v. *Duncan,* 7 Q.B.D. 198 (1881)

Precisely when this became established as a firm principle is not clear, see Kirk, *"Jeopardy" During the Period of the Yearbooks,* 82 U. Pa. L. Rev. 602 (1934), but there can be no doubt that it was a basic part of the English common law at the time of the American Revolution:

> "And first of the plea of Autrefois acquit, which is grounded on this maxim, That a man shall not be brought into danger of his life for one and the same offence, more than once. From whence it is generally taken, by all the books, as an undoubted consequence, that where a man is once found *not guilty* on an indictment or appeal free from error, and well commenced before any court which hath jurisdiction of the cause, he may by the common law in all cases whatsoever plead such acquittal in bar of any subsequent indictment or appeal for the same crime." 2 Hawkins, Pleas of the Crown 524 (6th ed. 1787).
>
> ". . . the plea of *auterfoits acquit,* or a former acquittal,

> is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime." 4 Blackstone, Commentaries *335.

This principle, "so deeply rooted in the law of England, as an indispensable requirement of a civilized criminal procedure, was inevitably part of the legal tradition of the English Colonists in America." *Green* v. *United States,* 355 U. S. 184, 200 (1957) (dissenting opinion of Mr. Justice Frankfurter). It thus found its way into our Bill of Rights, and from that time until the decision of the Court of Appeals in the present case, there had been no case in the federal courts in which an acquittal had been set aside.

At common law there appear to have been three situations in which a plea of *autrefois acquit* would not bar another trial for the same offense: where the indictment at the original trial was insufficient to sustain a conviction, *Vaux's Case,* 4 Co. Rep. 44 (1591), where the court in which the first trial was held lacked jurisdiction, See Blackstone, *loc. cit. supra;* Hawkins, *loc. cit. supra,* or where the original acquittal was obtained by fraud or collusion, see *Rex* v. *Furser,* Say. 89, 96 Eng. Rep. 813 (1753); 1 Bishop, Criminal Law §1028 (9th ed. 1923).

In all three situations, however, a second trial was allowed not because of the impropriety of the acquittal, but because the first trial was considered "void" in the sense that, no matter what happened during its course, there could not have been a valid conviction, and the defendant was therefore deemed never to have been in jeopardy. In *Vaux's Case,* this conclusion was based on the fiction that if the indictment was defective the trial court would inevitably

have set aside any conviction, and therefore even where a judgment of acquittal is entered by the court after a jury verdict of not guilty, the judgment must be presumed to have been based on the insufficiency of the indictment rather than the verdict. See 2 Hale, Pleas of the Crown 247 (1847). This Court, in *United States* v. *Ball*, 163 U. S. 662, 669 (1896), expressly rejected this fiction, and held that "a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing."

Although this Court has not had occasion to pass upon the effect of an acquittal procured by fraud, or rendered by a court lacking in jurisdiction, the state courts have largely followed the common law in these situations. See cases collected in Wharton, Criminal Law and Procedure § 139 at 311 n. 11, § 136 at 303 n.19 (12th ed. 1957).

We have not found a single case, however, in England, in the states which provide protection against double jeopardy, or in the federal courts, in which a defendant has been retried after once having been in jeopardy and acquitted on a valid indictment before a court of competent jurisdiction in proceedings free from collusion or fraud. Regardless how irregular or erroneous the acquittal may have been, the courts have uniformly held that the defendant cannot again be put in jeopardy.

> "After jeopardy has attached to the party, the government can take no step backward. If, through a misdirection of the court on a question of law, or a mistake of the jury, or their refusal to obey instructions or any like cause, a verdict of acquittal is improperly rendered, it can never afterward, on the application of the prosecutor, in any form of proceeding, be set aside and a new trial granted." [Citing numerous cases] 1 Bishop, Criminal Law § 992 (9th ed. 1923).

As recently as *Green* v. *United States,* 355 U. S. 184, 188 (1957), this Court reaffirmed the doctrine that an acquittal, however erroneous, is final.

> ". . . it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment is a bar to a subsequent prosecution for the same offense.' *United States* v. *Ball,* 163 U. S. 662, 671. Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. *United States* v. *Ball, supra; Peters* v. *Hobby,* 349 U. S. 331, 344-345. Cf. *Kepner* v. *United States,* 195 U. S. 100; *United States* v. *Sanges,* 144 U. S. 310."

The Government, of course, does not argue here, and the court below did not hold, that an acquittal can be ignored or set aside whenever there has been some impropriety or error in the trial.

Rather, the Government contended, and the court of appeals held, that the judgment of acquittal in this case was not merely erroneous but was beyond the "power" or "jurisdiction" of the court, and that in such circumstances it can be set aside and the defendants retried.

We will discuss in a subsequent portion of this brief the question of whether the trial court was without "power" to enter the judgment of acquittal in the circumstances of this case. Even assuming that the Government and the court below are correct on the "power" issue, however, it would violate the Fifth Amendment protection against double jeopardy to try the defendants again.

Despite the court's use of the term, "jurisdiction," there can be no dispute that the trial court had "jurisdiction" to try this case. As Judge Aldrich pointed out in his concurring opinion below:

> "The court apparently uses 'power' and 'jurisdiction' interchangeably. Certainly there is no question here about the district court's jurisdiction over the case and over the defendants. Accordingly, I will hereafter use the term 'power.' " (R. 59, n. 1)

There is thus no basis for arguing here that the entire trial was void and could not have led to a valid conviction. And, as we have seen, it is only in such circumstances that an "acquittal" has ever been held not to bar a second trial.

In short, the defendants in the present case clearly were in jeopardy. They were on trial before a court and jury having jurisdiction. They could have been convicted. In fact, they were acquitted. In those circumstances, the Fifth Amendment protects them from being retried regardless of the propriety of the judgment of acquittal.

The only case relied upon by the court below in holding that a second trial of the present defendants would not constitute double jeopardy was *Mitchell* v. *Youell*, 130 F.2d 880 (4th Cir. 1942). That case involved a petition for ***habeas corpus*** brought by a prisoner who claimed that his conviction was "void" because he was "tried without benefit of counsel amid circumstances which made the aid of counsel essential to that fair and impartial trial which due process contemplates." The court agreed and granted the writ, but pointed out that the defendant would be subject to a second trial.

> "While the conviction and sentence under the bill must be held to be void and the prisoner released from further service of the sentence, he will be subject to arrest and trial under the indictment. The defense of prior jeopardy will not protect him, for in holding that the trial was a nullity, we hold that he has not been in jeopardy under the charge. It is settled that an accused is not put in jeopardy by a void judgment of conviction, and that upon his discharge thereunder he may be again arrested and prosecuted." 130 F.2d at 882.

That case, of course, does not support the Government's argument here, not only because it involved the setting aside of a conviction rather than an acquittal (and thus presents no more of a double jeopardy problem than does the retrial of a defendant after a conviction is reversed on appeal), but also because, as the court held, the defendant in that case was never in jeopardy. See also *Johnson* v. *Zerbst,* 304 U. S. 458, 468 (1938), in which this Court held that if a defendant is denied the assistance of counsel in violation of the Sixth Amendment "the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by *habeas corpus.*"

Thus, neither the *habeas corpus* cases nor the cases which have permitted a second trial after an acquittal procured by fraud or rendered by a court without jurisdiction provide any basis for holding that it would not be double jeopardy to subject the defendants in this case, who have once been in jeopardy and who have been acquitted, to a new trial.

A recent English case, involving circumstances strikingly similar to those involved here, demonstrates that the critical question is not whether the trial court exceeded its power in acquitting the defendant, but whether the defendant was in jeopardy of conviction. In *Rex* v. *Middlesex Justices ex parte Director of Public Prosecutions,* [1952] 2 All Eng. Rep. 312 (Q.B. Div.), the trial judge had directed an acquittal before any evidence at all had been introduced. He had simply announced, at the very outset of the trial, that he had read the depositions in the case and that he believed there was not sufficient evidence to convict the defendant. When the prosecutor nevertheless began to present his case, the judge inquired of the jury whether it wanted to hear any evidence, and the foreman answered, "Under your direction, I should say no, my Lord." Thereupon, a verdict of "Not Guilty by direction" was entered and the defendant was released.

The prosecution sought a writ of certiorari to quash the verdict of acquittal, contending that "in this case there has been no trial at all, and therefore . . . the order of discharge should be quashed and this court should order that the case should be heard according to law." The court, however, while it chastised the trial judge in the strongest possible terms, and stated that his conduct "from first to last . . . can only be described as both unjudicial and injudicious," held that since the defendant had once been in jeopardy he could not be tried again.

> "Here the defendant was properly arraigned and the jury sworn to try him, so technically he was in peril, and as they returned a verdict of Not Guilty, however improperly that verdict may have been obtained, this court cannot, as it seems to us, direct a new trial." [1952] 2 All Eng. Rep. at 314.[1]

The earlier case of *Rex* v. *Simpson,* [1914] 1 K.B. 66, is also relevant. That case involved a prosecution for an offense under the Coal Mines Act of 1911. The trial court, after hearing evidence, dismissed the information. The prosecutor sought to have the judgment set aside, alleging that he had subsequently discovered that two of the justices

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[1] Admittedly, there are some differences between the British and American rules of double jeopardy. For example, in England a defendant cannot ordinarily be tried again even after his conviction has been reversed. See *Green* v. *United States,* 355 U. S. 184, 203 (1957) (dissenting opinion of Mr. Justice Frankfurter). However, the court in the *Middlesex Justices* case does not rely on any concepts which are foreign to the American law. Indeed, the court specifically rejected the argument that any analogy could be drawn between the power of the court to quash a conviction and the power to order a new trial after an acquittal:

> ". . . the books are full of cases where this court has interfered and quashed convictions where there has been a denial of what is for convenience called natural Justice.
>
> There is, however, no case to be found on the books in which the court has ever ordered a retrial after a verdict of not guilty."

who had sat on the trial court were, because of their connections with the coal industry, disqualified under the statute from sitting on cases of this sort without the consent of the parties. The court of Kings Bench held that the statutory disqualification did not render the justices in question wholly without jurisdiction, since they could have sat with the consent of the parties, and therefore the defendants had been in jeopardy and could not be retried.

A similar result was reached in two Irish cases, in each of which the prosecutor sought certiorari to set aside an acquittal on the ground that the trial judge had been biased, *Regina* v. *Justices of Antrim,* [1895] 2 I.R. 603 (Q.B. Div.); *Rex.* v. *Justices of Galway,* [1906] 2 I.R. 499 (K.B. Div.). In the former, Chief Judge O'Brien expressed the governing principle, as an Irishman might, in almost lyrical terms:

> "An acquittal by a tribunal of whatever degree is a judgment *in rem,* a judgment of personal *status.* The law takes off the hand of restraint from the accused, delivers him back into the condition of natural liberty, and seeks not to lure the bird from the air that has once left the cage. This principle is the very essence of the law of England as to personal condition, and tolerates absolutely no inconsistency with it." [1895] 2 I.R. at 641.

These cases demonstrate, we believe, that such questions as whether an acquittal was or was not erroneous, or whether it was or was not within the power of the trial court, are simply not relevant to the issue of double jeopardy. If the defendants have been acquitted after having once been in jeopardy of conviction, as they were here, they cannot be tried again.

B. Even if the Judgment of Acquittal Could Be Considered a Nullity, or Treated as an Order of Mistrial, the Defendants Could Not Constitutionally Be Tried Again.

The court below reasoned that if the trial judge exceeded

his power in granting the judgment of acquittal, that judgment would have to be considered "a nullity," and that in those circumstances the defendants could be tried again. As we have seen, however, the effectiveness of a judgment of acquittal must be determined not on the basis of whether the trial judge exceeded his power in granting it, but on the basis of whether the defendants were in jeopardy of conviction at the time it was granted. Applying that test to this case, the conclusion is unavoidable that the defendants have been effectively acquitted, and cannot be tried again.

But even if the court were correct in holding that the judgment of acquittal must be considered "a nullity," the constitution would prohibit a second trial. The Fifth Amendment, after all, protects defendants from being put "twice in jeopardy." Since it is impossible to impanel the same jury and resume the same trial, a second trial undeniably would be a second jeopardy. And it would result in precisely the evil that the Fifth Amendment was intended to prevent—giving the prosecution a second chance to obtain a conviction by bringing in new evidence or more persuasive, better prepared witnesses.

The Government, in its brief to the court below, attempted to avoid that dilemma by arguing that "the judge's order, being beyond his powers as a judgment, amounted in law only to the declaration of a mistrial." (Gov't Br. below p. 23). The court of appeals seems to have adopted this theory, for it stated that "the most the defendants would be entitled to would be an order of mistrial." (R. 54).

The difficulty with this argument is that whether or not the trial judge acted improperly in entering a judgment of acquittal, it would plainly have been improper and prejudicial to the defendants to order a mistrial in the circumstances of this case, and that fact in itself would preclude a second trial.

It must be remembered that the judge did not take action when he did because of any feeling that the jury had been

unfairly prejudiced against the defendants. On the contrary, the judge had stated: "I do not believe that there is a chance that this jury will convict these defendants. . . ." (R. 364).

The only event which could have been considered prejudicial to the defendants was the conduct of the prosecutor in talking privately to a witness after he had taken the stand, as a result of which the witness changed his testimony. The Government and the court below both took the view that this conduct was not improper. But if it were improper, the harm would be compounded, not remedied, by a mistrial. If the trial continued, the jury at least would know that the witness had changed his testimony, and the circumstances in which he had changed it. At a new trial, however, the prosecutor would be able to prepare the witness more carefully, and thereby avoid any contradiction in testimony taking place. And even if the contradiction at the earlier trial would be brought out on cross-examination, the effect could hardly be as dramatic as it was at the first trial.

Everything else that happened at the trial—the inarticulate and confused testimony of the Government witnesses, the judge's occasional impatience with and disapproval of that testimony, the judge's criticism of the prosecutor—clearly had benefited the defendants. A new trial would simply have given the Government a chance to improve its case. It was precisely for this reason that, when called upon by the judge to make a motion, the defendants did *not* move for a mistrial. The corporate defendant moved to strike the testimony of the witness or alternatively for an acquittal; the individual defendants moved only for an acquittal. If the judge had then declared a mistrial, it would plainly have been not for the purpose of protecting the rights of the accused, but for the benefit of the prosecutor.

It is well established that if a criminal trial is terminated in such circumstances, the defendant cannot be tried again.

". . . it is not even essential that a verdict of guilt or

> innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again. *Wade* v. *Hunter,* 336 U. S. 684; *Kepner* v. *United States,* 195 U. S. 100, 128. In general see American Law Institute, Administration of the Criminal Law; Double Jeopardy 61-72 (1935). This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict. At the same time, jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where 'unforeseeable circumstances . . . arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict.' *Wade* v. *Hunter,* 336 U. S. 684, 688-689." *Green* v. *United States,* 355 U. S. 184, 188 (1957).

In the early English common law, courts were not permitted to discharge the jury until a verdict had been rendered.

> "To speak it here once for all, if any person be indicted of treason, or of felony, or larceny, and plead not guilty, and thereupon a jury is returned, and sworn, their verdict must be heard, and they cannot be discharged . . ." 3 Coke, Institutes 110.

Although this may originally have been a rule of practice the violation of which did not preclude a second trial, see Kirk, *"Jeopardy" During the Period of the Yearbooks,* 82 U. Pa. L. Rev. 602, 603 (1934), 2 Hale, Pleas of the Crown 295 (1847), it ultimately became part of the doctrine of double jeopardy. See *Green* v. *United States,* 355 U. S. 184, 203 (1947) (dissenting opinion of Mr. Justice

Frankfurter). Thus, at common law, once the defendant had been put to trial, the trial had to be concluded, and once he had been convicted or acquitted, he could not be tried again.[2]

The American law developed somewhat differently. This Court held in *United States* v. *Perez,* 9 Wheat. 579 (1824), that a trial judge has authority to discharge a jury and order a new trial where the jury has failed to reach a verdict or where for any other reason such action is necessary or proper in the interest of justice.

> "We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. . . . We are aware that there is some diversity of opinion and practice on this subject, in the American courts; but, after weighing the question with due deliberation, we are of opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial." *Id.* at 580.

The common law rule that a jury could not be discharged for any reason was thus replaced in American jurisprudence

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[2] Not until the 1860's did the English courts hold that a jury could be discharged when it failed to reach agreement on a verdict. *Regina* v. *Charlesworth,* 5 L.T. 150 (Q.B. 1861); *Regina* v. *Winsor,* 10 Cox C.C. 276 (Q.B. 1865, Ex. Ch. 1866).

with the more practical and humane principle that a trial court has discretion to discharge the jury and order a new trial where such action is manifestly necessary or where it would serve the interests of justice.

It has always been understood, however, that if the trial judge declares a mistrial without sufficient justification or in circumstances in which such action is prejudicial to the defendant, the double jeopardy clause of the Fifth Amendment would bar a second trial. See, *e.g.*, *Wade* v. *Hunter*, 336 U. S. 684 (1949); *Simmons* v. *United States*, 142 U. S. 148 (1891); *Thompson* v. *United States*, 155 U. S. 271 (1894); *Logan* v. *United States*, 144 U. S. 263 (1892). In each of these cases, the question presented was whether the defendant could be retried after the first trial had been terminated by the trial judge prior to its conclusion, and in each case this Court held that the second trial was permissible because the action of the trial judge in terminating the first trial was proper. The clear implication of this line of cases is that if the judge *improperly* terminates a criminal trial after the defendant is in jeopardy the Fifth Amendment would preclude a second trial. And it is certainly improper to declare a mistrial where there is no necessity for it, and where the effect is prejudicial rather than helpful to the defendant. See *Cornero* v. *United States*, 48 F. 2d 69 (9th Cir. 1931); *United States* v. *Whitlow*, 110 F. Supp. 871 (D.D.C. 1953); *United States* v. *Shoemaker*, 2 McLean 114 (7th Cir. 1840); *United States* v. *Watson*, 28 Fed. Cas, 499 (S.D.N.Y. 1868).

The decision of this Court just last term in *Gori* v. *United States*, 367 U. S. 364 (1961), bears out this analysis. The petitioner in that case had been tried a second time and convicted, after the judge at the first trial had *sua sponte* declared a mistrial because of what he believed to have been improper conduct by the prosecuting attorney. Petitioner argued that his second trial constituted double jeopardy because the first trial had been terminated without manifest

necessity and without his consent. This Court, in a 5-4 decision, affirmed the conviction. The majority relied on the finding of the court of appeals that the trial judge, in declaring a mistrial, "was acting according to his convictions in protecting the rights of the accused," and that his action, while possibly "overassiduous," was not an abuse of discretion. In those circumstances, the Court held, the defendant could be retried even though he had not consented to the mistrial. The minority took a more narrow view of the judge's discretion to grant a mistrial, and held that "absent a showing of imperious necessity" a criminal trial may be terminated only with the defendant's consent.

The significant aspect of the case for present purposes, however, is that the court appeared to be unanimous in the view that if a mistrial is declared for reasons other than necessity or the protection of the defendant, a second trial would be prohibited by the Fifth Amendment. Since in this case, unlike *Gori,* there can be no question that a declaration of mistrial would have been prejudicial to the defendants, it follows that they cannot be tried again.

In an apparent effort to circumvent this difficulty, the Government argued in the court below that the defendants, "having solicited the interruption of the first trial by unlawful entry of a 'judgment of acquittal,' . . . cannot complain of a second trial." (Gov't Br. below p. 36).

In support of this contention, the Government relied on the cases which hold that a defendant can be retried if his conviction is reversed on his own appeal, *e.g., United States* v. *Ball,* 163 U. S. 662 (1896), if his conviction is set aside on a petition for *habeas corpus, e.g., Mitchell* v. *Youell,* 130 F. 2d 880 (4th Cir. 1942), or if a mistrial is granted on defendant's motion, *e.g., United States* v. *Harriman,* 130 F. Supp. 198 (S.D.N.Y.), *aff'd,* 219 F. 2d 918 (2d Cir. 1955).

Those cases, of course, are entirely inapposite here, for they all involved situations where the defendant *asks* for a new trial. In the present case, the defendants asked to be

acquitted. They did not ask for, and they plainly would not have consented to, a new trial. On the contrary, if the judge had denied the motions for acquittal, the defendants would undoubtedly have elected to continue the trial. Not only had the testimony of important Government witnesses been weak and contradictory, but the trial judge had unequivocally expressed his view that the jury could not possibly bring in a verdict of guilty (R. 364), and had plainly indicated that he would set aside such a verdict if it was returned (R. 362). Thus it would have been sheer foolhardiness for the defendants to ask for or consent to a new trial, and there is no basis whatever for inferring that they even contemplated doing so.

Even if it were possible to construct a theory on which it would have been proper for the trial judge to declare a mistrial in this case, the fact is he did not do so, and there is every reason to believe that he would not have done so. This Court, in *Gori,* held that the trial judge is vested with broad discretion "in determining whether or not a mistrial is appropriate," 367 U. S. at 366, and that that discretion is to be exercised in the light of all the circumstances of the trial, including those which only the trial judge can evaluate and which would not be reflected in the cold record. Surely, therefore, the judge's decision here not to declare a mistrial is as worthy of respect as the judge's opposite decision was in *Gori,* particularly since the record here shows no basis on which a mistrial might have been granted.

In short, none of the arguments advanced either by the Government or the court below provide any constitutional justification for trying the defendants again. If the judge exceeded his power in granting the judgment of acquittal, the judgment nevertheless cannot be considered void, for the fact remains that the defendants were in jeopardy and were acquitted. That fact in itself is sufficient to preclude a second trial. If the judgment could be considered void, the fact remains that the trial has been terminated, and that fact

in itself is sufficient to preclude a second trial. And if the action of the trial judge could be "deemed" to be a declaration of mistrial (although the judge certainly did not intend it to be that), the fact remains that a mistrial in the circumstances of this case would have been improper and prejudicial to the defendants, and that fact in itself is sufficient to preclude a second trial.

It may be, as the court below held, that the trial judge in this case committed error, perhaps even egregious error. It may even be that he exceeded his power. But error by the trial judge, of whatever magnitude and however it may be characterized, simply does not operate to take from the defendants their constitutional right not to be put twice in jeopardy for the same offense.

II—CONGRESS HAS PROVIDED NO JURISDICTION TO REVIEW JUDGMENTS OF ACQUITTAL, EITHER ON APPEAL OR BY WRIT OF MANDAMUS.

The Government has never had the right to appeal from a judgment of acquittal in any criminal case in the federal courts. This results not only from the Constitutional impediments which we have discussed above, see *Kepner* v. *United States,* 195 U. S. 100 (1904), but also from the fact that Congress has not given the courts of appeals any jurisdiction to entertain appeals from such judgments.

It must be remembered that the lower federal courts have only such jurisdiction as is given them by statute. U. S. Const., Art. III, §1; *Ex parte McCardle,* 74 U. S. (7 Wall.) 506 (1869); *Carroll* v. *United States,* 354 U. S. 394, 399, (1957). In order to sustain the action of the court below, therefore, it is necessary not only to overcome the Constitutional difficulties but also to find some statutory basis for reviewing and setting aside a judgment of acquittal.

In this case, the Government, conceding that it could not appeal, sought and obtained review of a judgment of ac-

quittal on a petition for mandamus, relying on 28 U. S. C. §1651(a) (hereinafter referred to as the "all writs" provision) as the basis of jurisdiction. In our view, however, the clear statutory policy against review of judgments of acquittal on appeal precludes the inference that the "all writs" provision creates jurisdiction to review such judgments on a petition for mandamus.

It is an established principle that the general power of a court to issue prerogative writs may not be used as a means to skirt a specific Congressional policy against review. The principle has most often been enunciated by this Court with respect to a problem in the civil field: the power to review a district court's remand of a case to the state court from which it has been removed.

In *Ex parte Pennsylvania Co.*, 137 U. S. 451 (1890), this Court ruled that when Congress, in a statute abrogating appeals, had indicated its hostility toward review of remand decisions, the jurisdiction of appellate courts to issue writs of mandamus was also denied. This ruling was reached although there was no provision expressly prohibiting review by mandamus.

> "The first question to be decided is, whether this court has power to grant the writ applied for. The general power of the court to issue a writ of mandamus to an inferior court, to take jurisdiction of a cause when it refuses to do so, is settled by a long train of decisions . . .
>
> ". . . and if the decision of the present case depended only on the general rule, the power of the court to issue the mandamus would be undoubted.
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> "But in our opinion, the matter is governed by statute. . . . The provision of the Act of 1887 is as follows: 'Whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded

to the state court from whence it came, *such remand shall be immediately carried into execution,* and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed' . . . In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the circuit court remanding a case to the state court final and conclusive. . . . The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are therefore of opinion that the Act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error." (pp. 452-54).[2a]

[2a] This decision has been followed in numerous cases, including *Ex parte Matthew Addy Steamship & Commerce Corp.*, 256 U. S. 417 (1921) and cases cited therein; *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374 (1937); *Kloeb* v. *Armour & Co.*, 311 U. S. 199 (1940); and *United States* v. *Rice*, 327 U. S. 742 (1946).

Another area in which this consideration has been applied is that of finality of ICC orders. "The policy of the law has been to give finality to orders of the Commission . . . and to keep them out of the courts . . . A dissatisfied complainant is not permitted to escape these

As we shall see, the history of Congressional regulation of review of criminal cases manifests a hostility toward review of judgments of acquittal even more deep-rooted and fundamental than that which is the basis for the remand decisions. It follows that, just as in the remand cases, the "all writs" provision should not be so construed as to undermine this policy.

At the time the "all writs" provision was originally enacted, as a part of the Judiciary Act of 1789, there was no appellate review of criminal cases whatever, at the behest of either the defendants or the Government.[3] This Court therefore held, in 1862, that the "all writs" provision did not apply to criminal cases at all, even when a prerogative writ was sought by a defendant. *Ex parte Gordon*, 66 U. S. 503 (1862).

If review of a judgment of acquittal by prerogative writ is available now, it must be that some action of Congress, subsequent to the *Gordon* decision, can be said to have made it so. There have been no relevant amendments to the "all writs" provision as such, of course. But that statute is by its nature a flexible jurisdictional grant, designed to aid the appellate jurisdiction of the courts. As Congress expands or contracts *appellate* jurisdiction, the scope of the "all writs" provision is sometimes affected.

Since the *Gordon* decision, Congress has provided a general appellate jurisdiction over criminal cases at the behest of the defendant, and a limited appellate jurisdiction at the behest of the Government. But in the course of so doing, Congress has manifested an opposition to review of verdicts favorable to the defendant. Therefore to conclude that anything has occurred which would make verdicts of acquit-

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limitations indirectly by broadening the functions of mandamus when he is barred from more direct review." *Interstate Commerce Commission* v. *United States*, 289 U. S. 385, 394 (1933).

[3] See *Carroll* v. *United States*, 354 U. S. 394, 400 n. 9 (1957).

tal reviewable by prerogative writ would be wholly unrealistic, and would thwart the intention of Congress.

The first Act of Congress authorizing any appeal in a criminal case was the Act of February 6, 1889, Chap. 113, 25 Stat. 656, which provided that "in all cases of conviction" of a capital crime in any court of the United States, the final judgment "against the respondent" might, on his application, be re-examined, reversed or affirmed by the Supreme Court on writ of error. "The writ of error given by that Act was thus clearly limited to the defendant." *United States* v. *Sanges,* 144 U. S. 310, 322 (1892).

The Judiciary Act of March 3, 1891, Chap. 517, 26 Stat. 826, which created the circuit courts of appeals, provided them with an appellate jurisdiction in criminal cases, and by its terms did not expressly limit the right of appeal to defendants. Nevertheless this Court held:

> "In none of the provisions of this Act, defining the appellate jurisdiction, either of this court, or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States." *United States* v. *Sanges, supra* at 323.

If it is "impossible to presume an intention on the part of Congress" to create an appeal on the part of the Government, which would be "so serious and far-reaching an innovation in the criminal jurisprudence of the United States," surely it cannot be inferred that at this juncture in history there was any intention to allow such review through the use of prerogative writs.

The first time Congress seriously considered giving the

Government any right to review was in 1906. In that year, a bill was passed by the House providing:

> "That in all criminal prosecutions the United States shall have the same right of review by writ of error that is given to the defendant, including the right to a bill of exceptions: *Provided,* That if on such writ of error it shall be found that there was error in the rulings of the Court during the trial, a verdict in favor of the defendant shall not be set aside." (H. R. 15434, as passed by House).[4]

The goal of the House bill was to allow review of errors, so that there would be appellate precedent, without in any way affecting the rights of the defendant in the particular case. His favorable disposition would not be set aside, but the appellate court could pronounce its judgment on the issues involved so as to govern future cases.[5]

The bill was then sent to the Senate. The Senate Judiciary Committee completely revised the bill, so that it allowed review to the Government in only the limited instances for which legislation was being sought by the Attorney General: demurrers to indictments, motions to quash or set aside indictments, and pleas in bar and arrests of judgment based on the factual or legal insufficiency of the indictment.[6] Discussions on the floor of the Senate by spokesmen for the revised bill made clear that review was limited to the enumerated instances because (1) there was fear that the procedures in the House bill would not constitute a "case or controversy" or would be "moot"; and (2) the enumerated instances were the only ones in which an exception to the existing rule of non-reviewability was necessary.[7]

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[4] 40 Cong. Rec. 5408 (1906).

[5] H.R. Rep. No. 2119, 59th Cong., 1st Sess. 3 (1906)

[6] S. Rep. No. 3922, 59th Cong., 1st Sess. (1906)

[7] See, *e.g.*, 41 Cong. Rec. 2752-53 (1907) (remarks of Senator Patterson); 41 Cong. Rec. 2821 (1907) (remarks of Senator Bacon).

The Senate's revised bill, as reported from Committee, contained no proviso expressly protecting verdicts of acquittal from review. Spokesmen for the Senate revision indicated that the proviso had been omitted inasmuch as (1) the limited instances of review provided could not possibly include any situation in which a verdict of acquittal had been obtained;[8] and (2) double jeopardy would make unnecessary any Congressional disallowance of such review.[9]

Nevertheless, perhaps out of abundance of caution, an amendment was proposed which was substantially identical to the House proviso.[10]

The proponent of the amendment, answering the arguments that double jeopardy made it unnecessary, stated:

> "But once tried and once acquitted, no matter on what point tried and acquitted, that ought to be the end of that man's trial. I have not used the word 'jeopardy' in the amendment. I want to steer clear of it. I am afraid of it.
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> * * *
>
> "But when a man has been once tried and once acquitted that ought to be the end of it, jeopardy or not." [11]

Although there was considerable skepticism as to the necessity for the amendment, expressed throughout its debate, it was ultimately adopted in the following form:

> "*Provided,* that no writ of error shall be taken or allowed the United States in any case where there has been a verdict in favor of the defendant." [12]

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[8] See, *e.g.*, 41 Cong. Rec. 2762 (1907) (remarks of Senator Spooner).

[9] See, *e.g.*, 41 Cong. Rec. 2753 (1907) (remarks of Senator Patterson).

[10] 41 Cong. Rec. 2745 (1907) (remarks of Senator Rayner)

[11] 41 Cong. Rec. 2747, 2748 (1907) (remarks of Senator Rayner)

[12] 34 Stat. 1246 (1907).

A subsequent amendment limited the Government's right to obtain review by further narrowing the grounds of appeal exclusively to instances where the judge's action was based on Constitutional or statutory construction grounds.[13]

As so amended, the revised bill passed the Senate.[14] In conference, the House accepted the Senate's revisions [15] and the bill became law. Act of March 2, 1907, 34 Stat. 1246.

This Act, which specifically precluded the setting aside of verdicts in favor of the defendant, clearly expressed a Congressional policy antagonistic to any review of such verdicts. Indeed, the statement of Senator Knox, a former Attorney General of the United States, and a prinicpal spokesman for the Act, makes clear that Congress was opposed to any review of occurrences at the trial favorable to the defendant:

> "These proceedings [made reviewable by the Act] are all defendant's acts before a verdict to prevent a trial, except the motion in arrest of judgment, which is defendant's act after a verdict against him to defeat a judgment on the verdict. These motions of defendant rest upon the want of jurisdiction of the court, the unconstitutionality of the statute, or some other lack of right to proceed to trial or to judgment on the verdict, the effect of all of which is to defeat the jeopardy. *Mark this: It is not proposed to give the Government any appeal under any circumstances when the defendant is acquitted for any error whatever committed by the court.*" [16]

And this Court, in *United States* v. *Keitel,* 211 U. S. 370,

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[13] 41 Cong. Rec. 2820 (1907)

[14] 41 Cong. Rec. 2825 (1907)

[15] See H.R. Rep. No. 8113, 59th Con 2d Sess. (1907)

[16] 41 Cong. Rec. 2752 (1907) (remarks of Senator Knox; emphasis supplied). To the same effect are the remarks of Senator Patterson: "Under the Senate bill there can be nothing which occurred on the trial submitted to the appellate court." 41 Cong. Rec. 2752 (1907)

398-99 (1908), held that Congress intended to confine the Government's right to review to the specifically enumerated instances set out in the Act:

> "That Act [of 1907], we think, plainly shows that, in giving to the United States the right to invoke the authority of this court by direct writ of error in the cases for which it provides, it contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. *We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to re-examine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same.*" (Emphasis supplied.)

This was reaffirmed in *United States* v. *Dickinson,* 213 U. S. 92, 103 (1909):

> "So far as that statute [Criminal Appeals Act of 1907] is an innovation in criminal jurisdiction in certain classes of prosecutions it cannot be extended beyond its terms."

And recently, this Court again pointed to the clear Congressional policy opposed to review in the areas involved in this case. *Carroll* v. *United States,* 354 U. S. 394 (1957):

> ". . . [I]n the federal jurisprudence, at least, appeals by the Government in criminal cases are something

unusual, exceptional, not favored. The history shows resistance of the Court to the opening of an appellate route for the Government until it was plainly provided by the Congress, and after that a close restriction of its uses to those authorized by the statute. . . . When the Congress responded to the problems of such cases [prosecutions dismissed because of construction or invalidating of statute], in the Criminal Appeals Act of 1907, now 18 U. S. C. §3731, *it did so with careful expression of the limited types of orders in criminal cases as to which the Government might thenceforth have review. . . .*" 354 U. S. at 400-02.

"The legislative history emphasizes the awareness of the Congress that Government appeals in criminal cases were a sharp innovation and congressional concern that such jurisdiction should go no further at that time than the immediate problem of affording review for trial court opinions as to the construction or validity of federal statutes." 354 U. S. at 402 n. 11. [Emphasis supplied.]

No changes were made in the Criminal Appeals Act until 1942. At that time, the Attorney General requested amendments which would, in major part, merely extend the enumerated grounds for appeal to instances where the basis for the judge's action was other than the Constitution or statutory construction.[17]

In his letter requesting these changes, the Attorney General reiterated the position that the Act must not provide for review of verdicts of acquittal:

"Such right should, of course, be limited to cases in which there has not been a verdict in favor of the defendant, for in such an instance the rule against double

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[17] In one other substantive change, informations as well as indictments were sought to be made reviewable.

jeopardy would conclusively bar the Government against securing a review." [18]

Despite this declared purpose to preserve the intent of the proviso inserted into the 1907 Act, the Attorney General, without explanation, eliminated the proviso from his draft bill.[19] That draft bill, with changes not relevant here, was enacted by both Houses without floor debate in either House.[20] Act of May 9, 1942, 56 Stat. 271. Nowhere in the Committee reports is any reason given for the elimination of the proviso.[21]

In light of the Attorney General's clear intention that there be no review of verdicts favorable to the defendant, we believe his omission of the proviso was due either (1) to his belief that it was unnecessary, since double jeopardy, in his own words, "would conclusively bar the Government against seeking a review", or (2) to a quite reasonable conclusion that by the limited terms of the Act, no verdict favorable to the defendant could possibly be reviewed thereunder.

In any event, the amendment in 1942 can in no way be construed as a departure from the theretofore clear Congressional policy that verdicts favorable to the defendant are not reviewable.

Subsequent minor changes in the language of the statute, in 1948 to conform its language to Rule 12 of the Federal

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[18] Letter, Attorney General to Speaker of the House, printed in H.R. Rep. No. 45, 77th Cong., 1st Sess. 2 (1941). We wish to note that the Attorney General spoke in terms of a bar to *review*, not merely to appeal.

[19] The Attorney General's draft bill was reported "favorably thereon without amendment," and without the proviso. H.R. Rep. No. 45, 77th Cong., 1st Sess. 1 (1941).

[20] 87 Cong. Rec. 1067 (1941) (House); 87 Cong. Rec. 9769 (1941) (Senate, with changes); Conference Report agreed to, 88 Cong. Rec. 3892 (1942) (Senate); 88 Cong. Rec. 3949 (1942) (House).

[21] See H.R. Rep. No. 45, 77th Cong., 1st Sess. (1941); H.R. Rep. No. 2052, 77th Cong., 2d Sess. (1942).

Rules of Criminal Procedure,[22] and in 1949 to conform its language "to the nomenclature of the courts",[23] did not constitute substantive changes.

What conclusions, then, can be drawn from this history? First, that the Criminal Appeals Act is a very limited encroachment on the pre-existing rule that the Government may not seek review in criminal cases, and second, that Congress (and the Attorney General in 1942) were explicit in opposing review of judgments of acquittal.

The Acts of 1889 and 1891, by granting defendants a full right of appeal, constitute a basis for finding the "all writs" provision applicable at the petition of the defendant. And the Act of 1907, as amended, constitutes a basis for finding the "all writs" provision applicable at the request of the Government to occurrences prior to trial or after conviction, similar to those made directly appealable. But all these statutes manifest a clear Congressional opposition to review at the Government's request of occurrences at the trial or of judgments of acquittal, and can hardly be deemed a basis for finding the "all writs" provision, which was not applicable to judgments of acquittal before these statutes were passed, applicable to them now.

In its brief below, the Government conceded that the principle we propose is applicable to judgments of acquittal rendered at the close of the Government's case: "The refusal of Congress to provide for the review of such judgments requires the inference that Congress did not intend that appellate courts should attempt to distinguish arbitrary acquittals and those which are merely erroneous." (Gov't brief below, p. 10). The principle is equally applicable, of course, to judgments of acquittal rendered prior to the close of the Government's case, for Congressional refusal to provide re-

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[22] Act of June 25, 1948, ch. 645 62 Stat. 844 (1948), 18 U.S.C. §3731 (1948). See *United States* v. *Pack*, 247 F.2d 168, 171 (3 Cir. 1957).

[23] Act of May 24, 1949, ch. 139, 63 Stat. 97.

view of judgments of acquittal has been unlimited in scope.

All the criminal cases we have found in which this Court has authorized review by prerogative writ have dealt with occurrences prior to trial or after conviction. Thus this Court has approved the use of prerogative writs to compel a trial judge to issue a bench warrant, long before trial, *Ex parte United States,* 287 U. S. 241 (1932), to prohibit a trial judge from suspending a mandatory sentence, after conviction, *Ex parte United States,* 242 U. S. 27 (1916), or from granting a new trial after a conviction has been affirmed on appeal, *United States* v. *Smith,* 331 U. S. 469 (1947); and to set aside the vacation of a judgment of conviction after the expiration of the term in which the judgment of conviction was entered, *United States* v. *Mayer,* 235 U. S. 55 (1914).

But the court below, in relying on certain of these cases as controlling in the instant action, overlooked the basic distinction between such cases, where the non-availability of direct appeal was "due to a lacuna attributable to the scope and coverage of the jurisdictional statutes" [24] and one, such as here, where "it is clear that there is a statutory policy, against appellate review of that judgment." [25] That distinction, as we have shown, is crucial.

We wish to comment briefly upon two other cases which, though not relied upon by the court of appeals, were cited by the Government in its brief below.

In *Ex Parte United States,* 101 F.2d 870 (7th Circuit 1939), *aff'd by an equally divided Court, sub nom. United States* v. *Stone,* 308 U. S. 519 (1939), the Government sought mandamus to review the judge's dismissal of an action rendered after a jury's verdict of conviction. The court of appeals held that the judge had acted within his powers, hence mandamus would not lie. The Government

[24] 6 Moore, Federal Practice ¶54.10[2], p. 67 and cases cited, n. 42.

[25] 6 Moore, Federal Practice ¶54.10[2], p. 67 and cases cited nn. 41 and 55.

cited this case for the proposition that mandamus is available to review verdicts "favorable to the defendant." The court of appeals did state in passing, and without consideration of the problems suggested above, that it could set aside the trial judge's order if he had exceeded his power in granting it, a statement which we believe is erroneous. But even that statement is of doubtful value to the Government in this case, since the court went on to hold that the district court has unlimited "inherent" power to enter judgments of acquittal.

In *United States* v. *Waters,* 175 F.2d 340 (D.C. Cir. 1948), the trial judge, after the jury had returned a verdict of guilty, had granted a judgment of acquittal on the ground that the indictment was insufficient. The rules provide for the entry of an arrest of judgment in such a situation, Fed. R. Crim. Proc. 34, which would be appealable, 18 U. S. C. § 3731. The Government appealed, and the court, on a motion to dismiss the appeal, held that "we must be guided in determining the question of appealability of the trial court's action not by the name the court gave it but by what in legal effect it actually was. It actually was an arrest of judgment." It further held that the substantive issue raised by the Government on the appeal was one involving the construction of a statute, and that therefore the appeal should have been taken to the Supreme Court rather than to the court of appeals. In accordance with the Criminal Appeals statute, the court certified the case to the Supreme Court where, without explanation, it was dismissed on motion of the Government. 335 U. S. 869 (1948).

The decision of the court of appeals in that case, even if correct, would not be of help to the Government here. The court there relied on the fact that the judge had unequivocally indicated that he was only ruling on the sufficiency of the indictment, and held that such a ruling is appealable under the Criminal Appeals act irrespective of how it is labelled. In the present case, the trial judge ruled that the

testimony of the Government's own witnesses and the conduct of the prosecutor had rendered the Government's case so defective that it should not be permitted to go to the jury. Such a ruling, however labelled, is precisely the type of event occurring in the course of a trial (rather than prior thereto or after a verdict if guilty) which is not subject to appeal or other review. Thus, even if *Waters* was correct in holding that it is the substance of a ruling, rather than the label attached to it, that determines its reviewability, the ruling in this case could not be reviewed.

Moreover, the *Waters* decision is in direct conflict with the unanimous decision of this Court in *United States* v. *Weissman*, 266 U. S. 377 (1924). In that case, as in *Waters*, the judge had directed a verdict of not guilty on the ground that the indictment was insufficient to charge a violation. And the Government in that case made precisely the same argument as was made in *Waters* — "that the judgment should be treated in substance as sustaining a demurrer to the indictment or quashing it." 266 U. S. at 378. In rejecting that argument this Court, speaking through Mr. Justice Holmes, held:

> "But we are of opinion that no such narrowing construction can be put upon the Criminal Appeals Act for the purpose of enlarging the Government's right to review. The words [of the Criminal Appeals Act as it stood at that time], taken literally, refer simply to the matter of fact that there 'has been a verdict,'- not qualified by any consideration of whether it was right or wrong . . .
>
> "It is suggested that the course adopted in this case offers to the lower court a means of escaping the review allowed by the act; and there is an innuendo that there was a desire of that sort below. But such considerations do not affect the construction of the act, and it is fair to say that while the judge should not have directed a verdict when he did so, and, if he thought

> the indictment bad, should have quashed it before the jury came in, and left the question in form to be taken up, still we see no sufficient reason for supposing that the direction was given with any notion of escaping the jurisdiction of this court."

We submit, therefore, that the holding of the court below that a judgment of acquittal can be set aside by writ of mandamus is wholly unsupported by the precedents, and runs directly counter to the entire legislative history of the various statutes governing review in criminal cases. Even if the trial judge exceeded his power in entering the judgment of acquittal, therefore, it was error for the court of appeals to exceed its jurisdiction by setting that judgment aside. In the words of a recent note in the *Yale Law Journal*, which criticizes the opinion below on this ground:

> "The necessity for close adherence by courts to the congressional policies concerning criminal appeals embodied in statutes defining the jurisdiction of appellate courts should be apparent. Federal courts are courts of limited jurisdiction: the limits on jurisdiction represent that distribution of judicial power in our federal system which is deemed optimal by Congress . . . Disavowal of jurisdictional power, in any given case, may offend an appellate court's sense of substantial justice, because of the possibility that rigid adherence to limits couched in jurisdictional terms may permit errors below to remain unrectified. Nevertheless, the arguments which favor appellate intervention in 'appropriate' cases must be balanced against the fact that appellate transgressions of jurisdictional limitations may be no less 'usurpations of power' than those actions by trial courts which prompt such unauthorized review." Note, *Mandamus to Review Judgments of Acquittal in Federal Courts*, 71 Yale L.J. 171, 177-78 (1961).

In this case, we fear, the Court of Appeals was misled

by what it conceived to be "the relative magnitude of the district court's error" [26] into a failure to respond to the demands of self-restraint imposed by a clear Congressional policy against review of judgments of acquittal.

III—THE TRIAL JUDGE DID NOT EXCEED HIS POWER IN RENDERING THE JUDGMENT OF ACQUITTAL

If the arguments we have made so far are correct, the court below need never have reached the issue of whether the trial judge exceeded his power in granting the judgment of acquittal, and this Court need not reach it. On the other hand, if, as we believe, the trial judge did not exceed his power, this in itself is a sufficient ground for reversing the decision of the court of appeals.

At the risk of being accused of "bootstraps" reasoning, we must point out that in a very real sense the arguments which we have already made are dispositive of the "power" question as well. The power of a federal judge, after all, must be determined with reference to the federal statutes, the Constitution, and the relevant common law traditions. The consistent Congressional hostility to any judicial review of judgments of acquittal, the constitutional protection against double jeopardy, and the common law background out of which that constitutional principle developed, all lead unavoidably to the conclusion that the power of a trial judge to acquit defendants who are properly before him is absolute.

The Government, we have seen, conceded in its brief below that there are no limits on the power of a judge to render judgments of acquittal after the close of the prosecution's case, "because the refusal of Congress to provide for

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[26] Concurring opinion of Judge Aldrich, in Court below (R. 62).

the review of such judgments requires the inference that Congress did not intend that appellate courts should attempt to distinguish arbitrary acquittals from those which are merely erroneous." (Gov't Br. below p. 10.) That argument, we have shown, applies equally to acquittals rendered at an earlier stage in the trial, since there is no basis for inferring that Congress intended them to be any less immune from review.

The power of a trial judge to render an acquittal has rarely even been challenged. Moreover, the few cases which have had occasion to deal with this issue all support the view that there are no limits on that power.

In *United States* v. *Weissman,* 266 U. S. 377 (1924) this Court held that a judgment of acquittal based on a holding that the indictment was insufficient was effective as an acquittal, even though no evidence had been introduced, and even though the proper action would have been to quash the indictment. The language of the opinion clearly implies that the sole test of the judge's "power" is whether he had jurisdiction over the subject matter and the parties:

> "Furthermore, if directing the verdict was wrong, it certainly was not beyond the jurisdiction of the court. The jury was there and the prisoners before them; and, so far as jurisdiction is concerned, it did not matter whether the evidence had been put in or not. We stop at the point of jurisdiction, the want of which would be the only pretext that could be offered for going behind the literal meaning of the statute. But we do not mean to imply that an opening by counsel or the offer of evidence is necessary to justify directing a verdict of not guilty; there are other cases in which it is done." 266 U. S. at 379.

In *Ex Parte United States,* 101 F.2d 870, 878 (7th Cir. 1939), *aff'd by an equally divided court, sub. nom. United States* v. *Stone,* 308 U. S. 519 (1939) the court held that

a trial judge has power to render a judgment of acquittal *non obstante veredicto,* even though the federal rules at the time did not expressly provide such a power, relying in part on the view that

> "In the absence of prohibitive legislation courts have inherent power to provide themselves with appropriate procedures for the performance of their tasks. Ex parte Peterson, 253 U. S. 300, 312, 313 . . . Funk v. U. S., 290 U. S. 371, 381-84 . . ."

Also relevant is the following statement of the court in *United States* v. *Heath,* 260 F.2d 623, 626 (9th Cir. 1958):

> "To prevent possible prejudice on trial beyond the general atmosphere of impartiality which traditionally pervades the courtroom, trial judges have wide discretion to methods of control. Among these are direction of mistrial, order to the jury to return verdict of acquittal and grant of new trial."

The danger that a trial court will abuse such broadly defined power is, we suggest, much less than the danger that any limitation of that power might render the court unable effectively to protect the rights of the accused. There already is some evidence that courts are over-cautious, rather than over-generous, in the exercise of the power to acquit. See Comment, *The Motion for Acquittal: A Neglected Safeguard,* 70 Yale L.J. 1151 (1961). And, after all, there are no limits on the power of the prosecution to "acquit" a defendant by entering a *nolle prosequi* in the interests of justice. Why should judges not be trusted with a similar power, particularly since it is they, not the prosecutors, who are the ultimate guardians of our liberties?

We believe, in short, that there are no limits to the trial judge's power to acquit. But, even if limits exist, they were not exceeded in this case.

We start with the proposition which was acknowledged

by the court of appeals, that mandamus does not lie to correct error, no matter how extreme. Questions such as whether the trial court's decision was right or wrong, or whether or not it would have been sustainable on appeal if appeal had been available, should not have been considered by the court of appeals. The standards which apply in review by mandamus have been clearly expressed in *Johnston* v. *Marsh,* 227 F.2d 528, 531 (3 Cir. 1955):

> "A judge having authority to act in a particular matter has, of course, the power to decide correctly or to make mistakes . . . But the fact that a court in the first instance decides a matter in a way which a court on appeal thinks incorrect is not a denial of the authority of the trial judge. We are not for a moment suggesting that the district court here did make a mistake. Neither are we saying that he was right. That point is not now before us. What we are deciding is that the court was acting within its jurisdiction. Since it was acting within its jurisdiction the writs prayed for are inappropriate because prohibition and mandamus only run against the judge when he has acted beyond his judicial authority or has refused to act within it."

Although the court below acknowledged the existence of this basic distinction, it is clear that the court ultimately set the acquittal aside because it thought the trial court had erred. In the words of Judge Aldrich's concurring opinion, "the court has been misled by the relative magnitude of the district court's error into confusing a difference in degree with a difference in kind." (R. 62).

The court did not hold that a trial judge cannot enter a judgment of acquittal for what he considers to be defects in the evidence prior to the close of the prosecution's case,[27]

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[27] ". . . perhaps, as the Government concedes, although again we do not need to decide and do not decide, judgment of acquittal might

but only that it was improper to do so on the facts of this case.[28] Nor did it hold that a trial judge cannot acquit because of misconduct by the prosecutor,[29] but only that in this case the judge erred in concluding that what the prosecutor had done was improper, and that even if it were improper, the only appropriate remedy would have been an order of mistrial.[30]

In other words, the court of appeals simply concluded that the judge's decision was not supported by the record. In our view, a judge lacks power only if he could not have done what he did on *any* record. To say, as the court below did, that the trial judge acted improperly on *this* record, is not to say that he exceeded his power but simply that he committed error.

Thus, if there are any limits at all on the power to acquit, the critical questions which must be asked in this case to determine whether the trial judge exceeded his power are

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properly be entered in some situations even before the close of the Government's case, as, for instance, when the Government's opening statement unmistakably shows that the evidence it proposes to introduce would not sustain a conviction, or when it produces evidence conclusively showing either that it has no case or that the accused has an iron-clad defense." (R. 54-55)

[28] "But there is no suggestion of any such situation here, for the judge abruptly terminated the Government's case by ordering the entry of a judgment of acquittal on evidence showing no defense and long before the Government had had an opportunity to show whether or not it had a case; and, moreover, he did so in ignorance of either the exact nature or the cogency of the specific evidence of guilt which Government's counsel said he had available and was ready to present." (R. 55)

[29] "Conceivably, although we have no occasion to decide and do not decide, a judgment of acquittal might be warranted in the event that deliberate misconduct of Government counsel is so outrageous as not only to render the trial in progress unfair but also to make a fair trial in the future impossible." (R. 54 n. 5)

[30] "The Assistant United States Attorney was not guilty of any misconduct or impropriety, and even if he had been it would seem that the most the defendants would be entitled to would be an order of mistrial." (R. 53-54)

precisely the ones the court of appeals avoided: may a judge acquit the defendants before the prosecution has rested if he finds, however erroneously, that the evidence is fatally defective, and may he do so when he finds, however erroneously, that there has been misconduct by the prosecutor which in his judgment justifies such action. We believe that the answer to both of these questions must be yes.

As to the first, we believe Judge Aldrich's concurring opinion below to be unanswerable. As he pointed out, it is well-established that a judgment of acquittal can be entered when the prosecutor concedes a critical fact in his opening statement, *United States* v. *Dietrich,* 126 Fed. 676 (C.C.D. Neb. 1904); *McGuire* v. *United States,* 152 F.2d 577, 580 (8th Cir. 1955), or in a stipulation, *United States* v. *Maryland Co-operative Milk Producers, Inc.,* 145 F. Supp. 151 (D.D.C. 1956). It follows, he said, "that if the court can make such a decision *in medias res* when its opinion of the damaging effect of particular facts is correct, it can equally do so when its interpretation is incorrect . . . given power to decide, there must be power to decide erroneously." He then argues:

> "There can be no doubt that even if a court found no conceded fact, as in the *Maryland Cooperative* case, fatal to the government, but nevertheless was of the opinion that the government's evidence was so unreliable and vacillating as to be utterly unworthy of belief, it could order an acquittal at the close of the government's case. The government could not appeal, no matter how erroneous the court's determination. I cannot think that a court is entirely without power to reach the same conclusion before the last witness has testified. It is not always necessary to eat the whole of an egg to know it is rotten. The fact that the court is obliged to put the defendant to the bar, *Ex parte U. S.,* 1932, 287 U. S. 241, seems a far cry from saying that it cannot, in a bona fide attempt to

weigh evidence introduced, conclude that what it holds to be a vital part thereof is so irretrievably bad that no jury could properly convict.

"Suppose here that instead of ordering an acquittal forthwith the court had stated that under the circumstances then disclosed all of the remaining evidence offered by the government must be excluded as irrelevant. Manifestly, the power to exclude evidence as irrelevant exists at all times. The government, perforce, would then have rested, and the court's power to acquit would have become absolute. In what way was the court's ruling (if the unreliability of the evidence was its reason for acquittal rather than government counsel's alleged misconduct) other than that evidence already introduced so fatally infected the case that all further evidence was irrelevant in the sense that it could not cure the defect? To say that this was done without sufficient consideration is not to say that it was done without power. I believe this court has been misled by the relative magnitude of the district court's error into confusing a difference in degree with a difference in kind." [31] (R. 60-62)

We believe that similar reasoning is applicable to the question of whether a judge has power to acquit when he believes that there has been misconduct of the prosecutor.

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[31] As Judge Aldrich pointed out, and as the Government conceded below, Rule 29 (a) of the Federal Rules of Criminal Procedure cannot be construed as limiting a trial judge's power to acquit prior to the close of the Government's case. That rule simply *requires* the judge to acquit at the end of the prosecution's case if he finds the evidence insufficient to sustain a conviction. It does not *prohibit* such action at an earlier stage of the trial, or on other grounds which might be sufficient in law. The Notes of the Advisory Committee on Rules state that the rule "substantially continues the existing practice." There is no indication, in short, that the rule was intended to limit the power of a trial judge to render a judgment of acquittal, and, indeed, it is questionable whether it could validly do so. *Cf. United States* v. *Bink*, 74 F. Supp. 603 (D. Ore. 1947).

Surely a judge has the power to rule on the propriety of the prosecutor's conduct. He therefore has the power to conclude, however erroneously, that particular conduct was improper. And if he also believes that there is no other effective way to remedy the misconduct he must have the power to grant an acquittal. *Cf. Jencks* v. *United States,* 353 U. S. 657 (1957)

Assuming, as we must, that the judge was correct in concluding that the prosecutor's conduct in talking to the witness after he had taken the stand was improper, the view that the only effective remedy would be an acquittal was not unreasonable. As we have seen, a mistrial would not have helped the situation, since it would merely have given the prosecutor a chance to prepare a better case. And while the judge might perhaps have struck the affected testimony, it is not uncommon for a judge to believe that what can be stricken from the record cannot be stricken from the jurors' minds.

In other words, the trial judge, faced with motions for a judgment of acquittal, had a number of issues to decide. He not only had the power to decide them, he had the obligation to decide them. That is the function of a trial judge. These issues included:

1. Was the evidence already presented so defective that no jury could possibly convict?
2. Was it misconduct for the prosecutor to talk to a witness outside the hearing of the judge and jury, to accomplish a change in the witness' testimony, after the witness had taken the stand?
3. If it was misconduct, was there any effective way to remedy the harm done short of entering a judgment of acquittal?

Whether or not the judge's decision on any or all of these issues was wrong, we cannot see how it can seriously be contended that he lacked power to decide them. And, of course,

the power to decide must include the power to act on the basis of that decision.

Thus this case is not, as the Government suggested below, comparable to a case in which a trial judge acquits the defendants because of his friendship for them, or for some similar reason. The judge here acted in good faith in a conscientious attempt to perform his judicial function as he understood it. The reasons he gave for his action were the kind of reasons which, in appropriate circumstances, would justify such action. That being so, the judge, whether or not he committed error, cannot be said to have exceeded his power.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be set aside, and the case remanded with directions to dismiss the petition for mandamus.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 65

STANDARD COIL PRODUCTS CO., INC.,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR STANDARD COIL PRODUCTS CO., INC.

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INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Constitutional Provision, Statutes and Federal Rules Involved 2

Statement 3

Proceedings Before the District Court 3

Proceedings Before the Circuit Court 8

Summary of Argument 13

Argument 20

I. It was improper for the court below to issue mandamus reviewing and vacating the judgment of acquittal directed by the trial court 20

A. The Issuance of the Writ of Mandamus Was Not "In Aid Of" the Circuit Court's Appellate Jurisdiction 21

B. The Issuance of Mandamus by the Court Below Violates the Basic Principle That Mandamus Will Not Lie to Review the Exercise of Judicial Discretion by an Inferior Court 22

C. The District Court's Direction of a Judgment of Acquittal Was Not Erroneous 24

D. Even if the District Court Committed Error It Was Not Acting Beyond Its Jurisdiction in Directing a Judgment of Acquittal 33

PAGE

(1) A District Court Has the Inherent Power to Direct a Judgment of Acquittal at Any Stage of a Criminal Trial 34

(2) The Government Was Not Deprived of a Jury Trial in the Present Case 42

(3) Rule 29(a) of the Federal Rules of Criminal Procedure Does Not Affect a Trial Court's Power to Direct an Acquittal at Any Stage of the Proceeding 44

E. Mandamus Does Not Lie Where Both Statutory and Common Law Policy Prohibit Appellate Review 47

II. The issuance of mandamus by the court below vacating the judgment of acquittal and ordering a new trial places petitioner in jeopardy in violation of the Fifth Amendment 52

A. The Judgment of Acquittal Directed by the District Court, Irrespective of How Improper It May Have Been, Constitutionally Bars a Retrial of Petitioner 52

B. Defendants Having Once Been Placed in Jeopardy Cannot Be Tried Again Even if the Judgment of Acquittal Could Be Considered a Nullity or Deemed an Order of Mistrial 56

Conclusion 64

Appendix A 1a

AUTHORITIES CITED

PAGE

Cases:

Ball v. United States, 163 U. S. 662 (1896) 53, 57, 62
Bankers Life & Casualty Co. v. Holland, 346 U. S. 379 (1953) 22, 35
Bath Co. v. Amy, 13 Wall. 244 (1872) 22
Belter v. State, 178 Wisc. 57, 189 N. W. 270 (1922) 37, 55
Berger v. United States, 295 U. S. 78 (1935) 40
Berkowitz v. United States, 90 F. 2d 881 (8th Cir. 1937) 45, 46
Best v. District of Columbia, 291 U. S. 411 (1934) 15, 38
Brown v. Capital Transit Co., 127 F. 2d 329 (D. C. Cir. 1942) 28
Bryan v. United States, 338 U. S. 552 (1950) 17, 45, 46
Burnet v. Alvarez, 226 U. S. 145 (1912) 44

Carroll v. United States, 354 U. S. 394 (1957) 14, 17, 24, 38, 49, 50
Commonwealth v. Adkins, 171 Ky. 299, 188 S. W. 401 (1916) 37, 55
Commonwealth v. Ball, 126 Ky. 542, 104 S. W. 325 (1907) 55, 62
Commonwealth v. Ramey, 279 Ky. 810, 132 S. W. 2d 342 (1939) 55
Cornero v. United States, 48 F. 2d 69 (9th Cir. 1931) 58, 60

DeBeers Consolidated Mines v. United States, 325 U. S. 212 (1945) 23
Delaware L. & W. R. Co. v. Rellstab, 15 F. 2d 137 (3rd Cir. 1926) 22
District of Columbia v. Burns, 32 App. D. C. 203 (D. C. Cir. 1908) 36, 41

Eckart, In re, 166 U. S. 481 (1897) 41

PAGE

Fauntleroy v. Lum, 210 U. S. 230 (1908) 16, 44
Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375 (1938) 22
First National Bank, Ex parte, 228 U. S. 516 (1913) 46
Frazer v. United States, 233 F. 2d 1 (9th Cir. 1956) .. 31

Glasser v. United States, 315 U. S. 60 (1942) 19, 25, 32, 63
Goldstein v. United States, 63 F. 2d 609 (8th Cir. 1933) 26
Gordon, Ex parte, 1 Black. 503 (1862) 48
Gori v. United States, 367 U. S. 364 (1961) 15, 19, 32, 39, 41, 42, 58, 60
Green v. United States, 355 U. S. 184 (1957) 18, 19, 54, 58, 60, 61, 63
Greenberg v. United States, 280 F. 2d 472 (1st Cir. 1960) 45

Hawkins, Matter of, 147 U. S. 486 (1893) 46

Interstate Commerce Commission v. United States, 289 U. S. 385 (1933) 17, 47

Johnson, In re, 72 S. Ct. 1028, 96 L. Ed. 1377 (1952) 46
Johnson v. Zerbst, 304 U. S. 458 (1938) 57
Johnston v. Marsh, 227 F. 2d 528 (3rd Cir. 1955) 40, 46

Kepner v. United States, 195 U. S. 100 (1904) 36, 54

La Buy v. Howes Leather Co., 352 U. S. 249 (1957) 23
Lamar v. United States, 240 U. S. 60 (1916) 15, 35
Lange, Ex parte, 18 Wall. 163 (1874) 53, 58
Loring, Ex parte, 94 U. S. 418 (1877) 22

PAGE

McGuire v. United States, 152 F. 2d 577 (8th Cir. 1945) 38
Mitchell v. Youell, 130 F. 2d 880 (4th Cir. 1942) 11, 57
Morrison v. District Court, 147 U. S. 14 (1893) 22

Newman, Ex parte, 14 Wall. 152 (1872) 13, 22, 24

Ochoa v. United States, 167 F. 2d 341 (9th Cir. 1948) 26
Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261 (1881) 38, 39

Park & Tilford, In re, 245 U. S. 82 (1917) 47
Pennsylvania Company, Ex parte, 137 U. S. 451 (1890) 17, 47
People v. Goldfarb, 152 App. Div. 870, 138 N. Y. Supp. 62 (1st Dept. 1912) 37, 45
People v. Merrill, 156 Misc. 637, 282 N. Y. Supp. 609 (1935) 45
People v. Terrill, 132 Cal. 497, 64 P. 894 (1901) 55
People v. Webb, 38 Cal. 467 (1869) 54
Perry, Ex parte, 102 U. S. 183 (1879) 13, 22

Roche v. Evaporated Milk Ass'n, 319 U. S. 21 (1943) 13, 20, 42

Simmons v. United States, 142 U. S. 148 (1891) 60
Smith v. United States, 173 F. 2d 181 (9th Cir. 1949) 29
State v. Council West, 71 N. C. 263 (1874) 55
State v. DeFord, 120 Ore. 444, 250 P. 220 (1926) 55
State v. Kelley, 193 Iowa 62, 186 N. W. 834 (1922) 55
State v. Kelsey, 49 N. D. 148, 190 N. W. 817 (1922) 37
State v. Taylor, 180 Ark. 588, 22 S. W. 2d 34 (1929) 54
State v. Thomson, 76 N. D. 125, 34 N. W. 2d 80 (1948) 37, 55
Sunal v. Large, 332 U. S. 174 (1947) 16, 42

Thompson v. United States, 155 U. S. 271 (1894) 60

PAGE

Umbriaco v. United States, 258 F. 2d 625 (9th Cir. 1958) 15, 36, 38
United States, Ex parte, 242 U. S. 27 (1916) 10, 39
United States, Ex parte, 287 U. S. 241 (1932) 10, 21, 43
United States, Ex parte, 101 F. 2d 870 (7th Cir. 1939) 16, 17, 38, 42, 46
United States v. Amorosa, 167 F. 2d 596 (3rd Cir. 1948) 25
United States v. Apex Distributing Company, 270 F. 2d 747 (9th Cir. 1959) 17, 39, 46
United States v. Borden Company, 308 U. S. 188 (1939) 21, 49
United States v. Carter, 231 U. S. 492 (1913) 14, 24
United States v. DeFillo, 257 F. 2d 835 (2d Cir. 1958) 25
United States v. Dickinson, 213 U. S. 92 (1909) 49
United States v. Dillon, 183 F. Supp. 541 (S. D. N. Y. 1960) 32
United States v. Glidden Co., 78 F. 2d 639 (6th Cir. 1935) 52
United States v. Harriman, 130 F. Supp. 198 (S. D. N. Y. 1955) 62
United States v. Heath, 260 F. 2d 623 (9th Cir. 1958) 15, 29, 36, 38, 39, 40, 46
United States v. Jones, 174 F. 2d 746 (7th Cir. 1949) 29
United States v. Koenig, 290 F. 2d 166 (5th Cir. 1961) 50
United States v. Laurelli, 187 F. Supp. 30 (M. D. Pa. 1960) 26
United States v. Maryland Cooperative Milk Producers, Inc., 145 F. Supp. 151 (D. D. C. 1956) 32, 36, 38, 46
United States v. Mersky, 361 U. S. 431 (1960) 17, 49
United States v. M'Hie, 194 Fed. 894 (N. D. Ill. 1912) 52
United States v. Oppenheimer, 242 U. S. 85 (1916) 24
United States v. Outer Harbor Dock & Wharf Co., 124 F. Supp. 337 (S. D. Calif. 1954) 45

PAGE

United States v. Perez, 9 Wheat. 579 (1824) 59
United States v. Potash, 118 F. 2d 54 (2d Cir. 1941) 60
United States v. Rice, 327 U. S. 742 (1946) 47
United States v. Sanges, 144 U. S. 310 (1892) 21, 36, 48
United States v. Stone, 308 U. S. 519 (1939) 16, 38, 42, 46
United States v. United States Industrial Alcohol Co., 15 F. Supp. 784 (D. C. Md. 1936) 52
United States v. Warren, 120 F. 2d 211 (2d Cir. 1941) 27
United States v. Watson, 28 Fed. Cas. 499 (No. 16651) (S. D. N. Y. 1868) 60
United States v. Weissman, 266 U. S. 377 (1924) 15, 16, 17, 24, 35, 39, 41, 51
United States Alkali Export Association v. United States, 325 U. S. 196 (1945) 23

Wade v. Hunter, 336 U. S. 684 (1949) 58, 60
Whitney, Ex parte, 13 Pet. 404 (1839) 46
Whitney v. Dick, 202 U. S. 132 (1906) 13, 20

Constitution, Statutes & Rules:

United States Constitution

Fifth Amendment 2, 52

18 U.S.C. §371 3

18 U.S.C. §1001 3

18 U.S.C. §3731 (Criminal Appeals Act) 2, 13, 20, 49, 1a

28 U.S.C. §1254(1) 1

28 U.S.C. §1651 ..... 1a

28 U.S.C. §1651(a) 2, 13, 20

Judiciary Act of March 3, 1891, section 6, 26 Stat. 828 48

PAGE

Criminal Appeals Act

56 Stat. 271 49

62 Stat. 844 49

63 Stat. 97 49

Federal Rules of Criminal Procedure

Rule 29(a) 2, 10, 16, 33, 44, 45, 3a

Rule 37(a) 2, 8

Rule 37(a)(2) 22, 3a

Miscellaneous:

4 Blackstone's Commentaries 335 52

41 Cong. Rec. 2748 (1907) 50

41 Cong. Rec. 2752 (1907) 50

41 Cong. Rec. 3046 (1907) 50

H. R. Rep. No. 2119, 59th Cong. 1st Sess. 1, 3 (1906) 50

Kurland, The Mersky Case and the Criminal Appeals Act, 28 U. Chi. L. Rev. 419 (1961) 50

Orfield, Criminal Procedure From Arrest to Appeal (1947) 56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 65

STANDARD COIL PRODUCTS CO., INC.,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR STANDARD COIL PRODUCTS CO., INC.

Opinions Below

The district court's statement directing the jury to return a verdict of acquittal appears at R. 572-575; it is not officially reported. The opinions of the circuit court below and that of the concurring circuit court judge are reported in 286 F. 2d 556, R. 45-65.

Jurisdiction

The jurisdiction of this Court to review the judgment of the circuit court below is invoked by petitioner under 28 U. S. C. §1254(1). The petition for a writ of certiorari was filed on March 7, 1961 and granted on June 19, 1961.

Questions Presented

Whether it was proper for a circuit court of appeals to issue a writ of mandamus vacating a judgment of acquittal directed by a district court on the eighth day of a criminal trial where the district court had concluded prior to the close of the Government's case that there had been testimonial deficiencies on the part of key Government witnesses, improper conduct by Government counsel with respect to a vital aspect of one part of the Government's case and that an acquittal was required in the interests of justice.

Whether, on the above facts, jeopardy attached within the meaning of the Fifth Amendment, so as to bar the circuit court from issuing mandamus vacating the judgment of acquittal and ordering a new trial.

Constitutional Provision, Statutes and Federal Rules Involved

U. S. CONST. amendment V provides in pertinent part:

> " . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . ."

The applicable provisions of the following statutes and Federal Rules of Criminal Procedure are quoted *infra* in Appendix A:

"All writs" statute, 28 U. S. C. §1651(a).
Criminal Appeals Act, 18 U. S. C. §3731.
Federal Rules of Criminal Procedure, 29(a) and 37(a).

Statement

Proceedings Before the District Court

An indictment in nine counts was returned on January 15, 1960 by a federal grand jury in the District of Massachusetts against petitioner Standard Coil Products Co., Inc. and two of its employees (R. 6-23). Petitioner and the individual defendants, together with various named and unnamed alleged co-conspirators, were charged with having fraudulently concealed and conspired to conceal, in violation of 18 U. S. C. §§371 and 1001, during the period from September 1956 to November 1957, material facts relating to the falsification of the testing of devices known as radiosondes,* which were being manufactured by petitioner under two successive contracts for the Army Signal Supply Agency.

Pursuant to the indictment, the defendants were brought to trial in the District Court for the District of Massachusetts before the Honorable Charles E. Wyzanski, United States District Court Judge for that district. The District Court had unquestioned jurisdiction over the defendants and the offenses charged. A jury was impaneled on September 8, 1960 (R. 75), and the Government attorney made an opening statement to the jury (R. 69-74) and thereafter commenced the Government's presentation of evidence and witnesses (R. 75, *et seq.*).

The prosecution's opening indicated that the Government's presentation would be in two stages, the first consisting of evidence as to "how the tests were supposed to be run" (R. 72), and the second stage encompassing "the

* A radiosonde is an electronic device designed to be parachuted from an airplane which furnishes, by means of continuous radio signals in Morse Code emitted during its descent, temperature, pressure and humidity weather information

charges of the indictment and what the government will prove was done wrong" (R. 72). The court and jury were further informed by the prosecution's opening (R. 70):

> "Before you can follow the testimony about the falsification of the tests you will have to know something about the instrument involved, how it was made and how it was to be tested . . ."

The first Government witness who testified was one Paliatto whom the trial court considered to be the Government's principal witness (R. 359).* Although the prosecuting attorney disputed this (R. 359), the record discloses that Paliatto was the chief Government inspector at petitioner's plant (R. 81, 254); he had determined which radiosonde units were to be tested (R. 156-57, 177); he had designated the extent of testing that petitioner was required to perform (R. 308, 309); he had full responsibility for seeing that the tests were conducted properly (R. 274); and he had initiated the F.B.I. investigation leading to the indictment (R. 353-54). Moreover, Paliatto was to testify both as an "expert" on how the tests were supposed to be conducted and on his "specific" knowledge of alleged acts of improper testing (R. 80, 365).

Paliatto testified as to the first part of the Government's case for almost six full trial days (R. 79-480). During the course of his testimony the trial court found it necessary to ask him numerous questions designed to elicit intelligible explanations concerning the radiosonde and its complicated testing procedures. Full opportunity was given the witness to clarify and explain his testimony, including several recesses declared by the trial judge during Paliatto's direct examination to enable him and Government counsel to simplify explanations of technical matters (R. 117-118, 148, 172).

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* The circuit court also referred to Paliatto and Rosenholm as "principal witnesses." (268 F. 2d at 560, R. 50).

At the end of the second day of Paliatto's testimony the trial judge stated that he was "quite prepared to take drastic action" if by the next trial day the Government's case were not better prepared as to the technical matters so that the jury could get a "fair picture" (R. 172). Prior to this time and on several subsequent occasions, Paliatto's testimony caused the trial judge to caution the witness to think before he testified and to consider more carefully his testimony and its significance in view of the gravity of a criminal proceeding (R. 151, 166, 313-314, 328, 352, 478).

On the third day of the trial Paliatto testified that the allegedly falsified test results were embodied in tapes which, after completion of each test series, had been delivered to him (R. 179-180). Subsequently, on the fifth day of the trial, Paliatto admitted that he had destroyed some of his records but first testified that none of these were pertinent to radiosondes (R. 352). However, a few moments later he admitted that he had destroyed radiosonde test tapes but denied that he had done so after the F.B.I. investigation was initiated (R. 353). Upon further questioning, he finally admitted that he had destroyed these tapes after he had made his complaint to the F.B.I. (353, 357, 358). At this juncture, the trial court excused the jury and recommended to the United States Attorney that it would be in the public interest to *nolle prosse* the case against the defendants (359-364). The trial judge, during this conference at the bench, expressed the opinion that Paliatto's testimony was not trustworthy and could not be given any credit (R. 360, 362). The judge further stated that he did "not believe that there is a chance that this Jury will convict these defendants" (R. 364), and that even if in the unlikely event the jury were to believe Paliatto and return a verdict of conviction it would be "almost inevitable" that he would have to set aside such a verdict (R. 362).

Notwithstanding the trial court's recommendation, the Government proceeded with the trial. The Government's next important witness was one Rosenholm, a former employee of petitioner, who identified himself as a "final inspector of" radiosondes (R. 501). This witness had been named as a co-conspirator but not as a defendant (R. 543-544).

Rosenholm, in the trial court's opinion, proved no more reliable a witness than Paliatto (R. 573). At one point Rosenholm retracted and completely changed a segment of his testimony relevant to the Government's contention as to the manner in which a test operator was receiving information to enable her to carry out her allegedly fraudulent tests (Compare R. 543-45 with R. 546-48). This led the trial court to view his testimony as showing "either a lamentable lack of memory or an extraordinary power of inventiveness" (R. 575). Then, on the eighth day of trial, Rosenholm changed his earlier testimony with respect to the date of an alleged conversation with a representative of petitioner in order to bring the conversation within the period of the indictment (Compare R. 559 with R. 552; R. 567-68). This alleged conversation was vital to the Government's theory that petitioner had been "apprised" of the alleged acts of fraud and had thereafter conspired to conceal them (R. 557, 574). Cross examination revealed that this change in his testimony resulted from a private conference with the prosecuting attorney that very morning within an hour and a half of his resuming the stand (R. 567-68).

At this point the trial judge excused the jury and in the course of the ensuing colloquy with counsel, expressed his belief that the prosecutor had violated an "elementary rule" by "tampering" with his witness in a criminal case "*in media res*" (R. 569). The prosecuting attorney took the position that his action was in no way improper

(R. 570) but that in any event the trial should not be terminated at this stage since there were a number of other witnesses whom the Government intended to call in support of its case (R. 572). Petitioner's counsel contended that the defense had been put in "a very difficult position" and moved for an acquittal or alternatively to strike Rosenholm's testimony (R. 572). Counsel for the individual defendants joined in the motion for acquittal (R. 572). The trial court then recalled the jury and reviewed the testimonial deficiencies of the Government witnesses, the conduct of Government counsel with respect to Rosenholm's changed testimony and the significance of this change (R. 573-575). The trial judge then concluded (R. 575):

> "With due regard for the principles of justice under law, I must bear in mind not only what may be correct, but what is fair. In our constitutional system, under our jurisprudence, many things which are true are not allowed to be shown. Examples are a confession extorted by physical coercion; such a confession is not admissible although it may be perfectly correct and the defendant may be guilty. Likewise, information procured by an unlawful search and seizure may be perfectly true and the defendant may be guilty; nonetheless it is well settled that no conviction can be based lawfully upon information unconstitutionally procured by an unreasonable search or seizure.
>
> "These principles illustrate the sensitivity of American courts to fair play in connection with every aspect of the criminal law. It is not the duty of a court to see that every guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law.
>
> "Bearing in mind those principles, and responding to the motions of acquittal made by counsel for the individual defendants and the corporate defendant, I direct you at this stage to return the verdicts of ac-

quittal with respect to each of the individuals and with respect to the corporation.

* * * * *

"The Court: The defendants will stand. . . . You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free."

Judgment of acquittal was entered on September 21, 1960 (R. 37). The Government thereafter, on September 28, 1960, moved the district court to vacate its judgment of acquittal and reassign the case for trial on the grounds that (1) the court had no authority to discharge the defendants until the Government completed its evidence; (2) the judgment of acquittal, being "beyond the power of the Court and void, . . . amounted to no more than the granting of a motion for mistrial."; (3) even a mistrial was not justified under the circumstances; and (4) the Government had been "deprived of its day in Court" (R. 38-39). This motion was denied by Judge Wyzanski (R. 39).

Proceedings Before the Circuit Court

On November 3, 1960, after the expiration of the time allowed for any appeal by Rule 37(a) of the Federal Rules of Criminal Procedure if one were permissible, the Government petitioned the Court of Appeals for the First Circuit for a writ of mandamus (R. 1). The circuit court on February 2, 1961 issued the writ of mandamus sought by the Government vacating the judgment of acquittal and ordering that the case be reassigned for trial before another judge (R. 65).

The circuit court was unanimous in its opinion that the issuance of the prerogative writ was proper because the trial judge had exceeded his power in directing an acquittal and consequently the acquittal was null and void. The

circuit court, however, differed in its reasons for reaching this conclusion. The majority opinion, although it examined the details of the trial at great length (286 F. 2d at 558-62, R. 46-53) believed it not clear on the record whether the trial judge had directed the acquittal because he thought the Government's testimony "was not entitled to belief" or because "he thought the action of the Assistant United States Attorney in talking with a government witness during a recess called while the witness was on direct examination deprived the defendants of some basic civil right." In either event, the majority opinion went on to say, the trial judge's "action was not only plainly erroneous but beyond his jurisdiction" (286 F. 2d at 560, R. 50).

As to the first possible ground for the direction of the acquittal, the circuit court was extremely critical of the trial court. Although acknowledging that "The testimony of the two principal witnesses . . . was certainly confused and conflicting.", it concluded that this ". . . was due in no minor part to the trial judge's persistent, sharp and sometimes caustic cross-examination. . . ." (286 F. 2d at 560, R. 50-51.)

The majority felt that the second possible ground on which the trial court might have based its action was similarly unsupportable. It conceded that there might be some instances where deliberate misconduct of Government counsel could be considered so outrageous as to warrant a judgment of acquittal (286 F. 2d at 562, n. 5, R. 54, n. 5). But, noting that it was "at a loss to understand the basis for the judge's criticism . . . ," it concluded that on the facts of this case the prosecuting attorney "was not guilty of any misconduct or impropriety, and even if he had been it would seem that the most the defendants would be entitled to would be an order of mistrial." (286 F. 2d at 562, R. 53-54.)

Having determined that the trial court had erred, the circuit court then turned to the question of whether it had power to correct the error. It conceded that, in view of the inability of the Government to appeal, mere error committed by the trial court was not reviewable by mandamus or otherwise. The only reason for issuing the writ would be an exercise by the trial judge of a power he did not possess. Further assuming that the trial court had power to order an acquittal, under Rule 29(a) of the Federal Rules of Criminal Procedure, after the Government had closed its case, and taking note of the Government's concession that such an order might be entered before the close of the Government's case if it were clear that, irrespective of the evidence to be produced later, what had already transpired made a conviction impossible, the majority opinion concluded that under the circumstances of the present case the court had no power to enter a judgment of acquittal and that mandamus was a proper remedy to correct the purported exercise of that power (286 F. 2d at 562-565, R. 54-58). The majority based this conclusion primarily on two cases, *Ex parte United States*, 242 U. S. 27 (1916), and *Ex parte United States*, 287 U. S. 241 (1932). In the first case, which the circuit court conceded was not strictly in point, this Court had held that a district judge had no power to suspend a mandatory sentence, and that mandamus would lie to require the judge to vacate the order of suspension. Primarily relied upon by the circuit court was the observation by this Court, in that case, that if the legislative command fixing a specific punishment could be set aside it would follow that a trial judge could refuse to treat as criminal an act which the legislature had so designated (286 F. 2d at 563, R. 55-56).

More nearly in point, the court of appeals said, was the second case entitled *Ex parte United States*. In that case this Court had issued a writ of mandamus directing a

district judge to issue a bench warrant which he had refused to do despite the fact that an indictment had been returned by a properly constituted grand jury. That case, the court of appeals argued, established that the writ of mandamus was available in aid of its appellate jurisdiction and established "the necessity for issuing the writ" to confine trial judges within their jurisdictional limits (286 F. 2d at 563, R. 56). Then arguing by analogy, the court concluded that if a trial judge does not have the power to prevent the arrest of one properly accused of crime, or to refuse without valid reason to try a criminal charge, it followed that a trial judge had no power "arbitrarily to halt the trial of an accused when the government has only begun to present its evidence of guilt." "We see no difference in principle between blocking a criminal trial at the threshold and blocking it when the government has barely had a chance to put its toe in the door." (286 F. 2d at 564, R. 57-58.)

After reaching this decision that it had the power to set aside the judgment of acquittal, the circuit court proceeded to the question of double jeopardy. Admitting that it would be pointless to issue the writ of mandamus if the plea of *autrefois acquit* would be available on a second trial, it concluded that since the trial judge had no power to enter a judgment of acquittal there would be no basis for a claim of double jeopardy (286 F. 2d at 564-565, R. 58), citing *Mitchell* v. *Youell*, 130 F. 2d 880 (4th Cir. 1942). In the *Mitchell* case, the circuit court in a habeas corpus proceeding vacated a state court conviction because the prisoner had been denied counsel at his trial in violation of the Fourteenth Amendment. In so doing, the circuit court noted that a plea of double jeopardy would not lie if he was retried.

Judge Aldrich, although concurring in the result, differed sharply from the majority opinion in his reasoning.

Unlike the majority, Judge Aldrich affirmatively held that a trial court did have authority to enter a judgment of acquittal at any stage at which a fatal deficiency in the Government's evidence appeared. That being so, he concluded, and the decision of the trial judge not being reviewable, it would follow that a judgment of acquittal, no matter how erroneous, based upon the trial judge's determination that there was a fatal deficiency in the Government's case, could not be vacated by way of mandamus.

The considerations were different, Judge Aldrich argued, with respect to the claim of misconduct by Government counsel. True, the trial court clearly had the power to determine that the conduct of counsel was improper, and the power so to determine necessarily included the power to determine erroneously. But Judge Aldrich concluded that "What corrective steps the court should take after its determination of a procedural error is a separate question." Even assuming that the prosecutor had violated a rule of conduct in speaking to the witness, Judge Aldrich held that this misconduct did not justify an acquittal because it was "anything but deliberate," and it was not prejudicial to the defendants. Since the date was "a preliminary matter . . . " its "present effect . . . upon the trial was nil. Its future effect was entirely in the control of the court, who could exclude any further evidence relating to this as yet undisclosed conference." Judge Aldrich concluded that on these facts, the trial court would have no power to acquit.

Under Judge Aldrich's view, it was critical to determine whether the trial judge had entered the judgment on the basis of his conclusion concerning the evidence or on his view as to Government counsel's misconduct. Finding, as the majority was unable to do, that the record showed the trial judge had acted because of his belief that the Assistant United States Attorney had conducted himself improperly, he concurred in the judgment of the court. (286 F. 2d at 565-568, R. 59-65.)

SUMMARY OF ARGUMENT

I.

Mandamus was improperly issued by the Circuit Court.

A. The "all writs" statute, 28 U. S. C. §1651(a) (*infra*, Appendix A) empowers circuit courts of appeal to issue a writ of mandamus only when "in aid of" their appellate jurisdiction. *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 25 (1943); *Whitney* v. *Dick*, 202 U. S. 132, 136-137 (1906). Any actual or potential appellate jurisdiction in the court below was extinguished by the judgment of acquittal directed by the trial court, in a case properly before it, from which acquittal the Criminal Appeals Act, 18 U. S. C. §3731 (*infra*, Appendix A) authorizes no review at the instance of the Government. Accordingly, there was no appellate jurisdiction "in aid of" which the circuit court could issue the writ.

B. The "all writs" statute permits the issuance of a writ of mandamus only if "agreeable to the usages and principles of law." The writ may not be used to review an exercise of discretion or judgment by a trial court in respect of a case properly before it. *Ex parte Perry*, 102 U. S. 183 (1879). In the present case, the district court's direction of an acquittal in response to defendants' motions constituted such an exercise of judgment. The Government's use of the extraordinary process of mandamus in this case is not to compel action by a competent tribunal, but for the improper purpose of reviewing and reversing an alleged error committed in the course of a trial. This is not the office of a writ of mandamus. *Ex parte Newman*, 14 Wall. 152, 169 (1872). Nor can the issuance of the writ in the present case be justified by labeling the judgment

of acquittal as a "mistrial." Previous similar Government attempts in criminal cases to fictitiously label judgments entered by trial courts in order to obtain a right of review for the Government have been regularly defeated by this Court. See *Carroll* v. *United States*, 354 U. S. 394, 406 (1957); *United States* v. *Carter*, 231 U. S. 492, 494 (1913). Moreover, resort to such a fiction is factually barred in the present case because at the time the acquittal was directed, the posture of the trial was such that petitioner would in no event have requested or consented to a mistrial.

C. The starting point from which the circuit court reached its final conclusion that the acquittal was a "nullity" was its opinion that the trial judge interfered with the Government's presentation of its case by his extensive questioning and had no basis for criticizing the prosecuting attorney for instigating, during a recess, a change in the testimony of an alleged co-conspirator. However, as the Government itself recognized (R. 70), it was first necessary to clearly show the proper testing procedures before the Government could hope to prove that improper tests had been made. The technical nature, combined with the ineffective presentation of the Government's case, made it the duty of the trial court to extensively question the Government's witnesses in an attempt to elicit "a fair picture" (R. 172). Moreover the record fully supports the trial court's finding that the Government witnesses "showed a lamentable lack of awareness or lack of capacity in connection with their testimonial obligations" (R. 573). Furthermore, the trial court's criticism of the conduct of Government counsel for failing to conform to the high standards of fairness required of the Government in a criminal prosecution was justified, particularly where the changed testimony of the alleged co-conspirator induced out-of-court by the Government involved the heart of the Government's

charge that petitioner had conspired to conceal the allegedly improper tests. For these reasons, the trial court, on the eighth day of trial, properly directed an acquittal in the interests of justice.

D. Assuming the trial court improperly directed an acquittal, this error was not of a jurisdictional nature. The power to decide encompasses the power to decide wrongly, no matter how serious or fundamental the error. *Lamar* v. *United States*, 240 U. S. 60, 64-65 (1916). A trial court having jurisdiction over the offense charged and the defendant, has the power to direct a judgment of acquittal at any stage of the trial. *United States* v. *Weissman*, 266 U. S. 377 (1924). A district court judge has the power to direct an acquittal even before the presentation of any evidence, *Best* v. *District of Columbia*, 291 U. S. 411, 415 (1934); *United States* v. *Heath*, 260 F. 2d 623 (9th Cir. 1958), and even after a jury verdict of conviction, *Umbriaco* v. *United States*, 258 F. 2d 625, 626 (9th Cir. 1958). It would be unreasonable and illogical to hold that this power is abated once the presentation of the evidence begins and is resurrected only when the Government concludes its case. Nor is there any support in authority or reason for depriving a trial court of power to direct an acquittal because of improper conduct by the prosecutor. The rationale of this Court's recent decision in *Gori* v. *United States*, 367 U. S. 364 (1961), is that the trial court should be left free to take such action as, in its "sensitive judgment," it believes necessary for the "more effective protection of the criminal accused."

The dangers of such judicial power being abused by whimsical or arbitrary federal trial judges are more imaginary than real. In any event, making a sacrifice of the deep-rooted principle of our criminal law which accords non-reviewable status to a judgment of acquittal,

will not give effective protection against them. On the other hand, very real dangers to the administration of criminal justice may flow from the constricted view of a trial court's power taken by the court below, opening the door wide to collateral attacks which may be brought in some other court at some unknown time in the future, on an unpredictable number of judicial rulings and decisions.

There is no validity in the Government's assertion that the trial court's direction of an acquittal should be treated as a nullity because it allegedly deprived the Government of a "fundamental" right to a jury trial. Assuming the Government has a right to a trial by jury in a criminal case, this right encompasses a trial before a judge and a jury, and even an erroneous ruling on a legal issue by a trial court which takes the case away from the jury cannot be considered a deprivation of the right to trial by jury. *Ex parte United States*, 101 F. 2d 870, 874-77 (7th Cir. 1939), *aff'd sub nom. United States* v. *Stone*, 308 U. S. 519 (1939); see *Sunal* v. *Large*, 332 U. S. 174 (1947).

Similarly without merit is the Government's contention that Rule 29(a) of the Federal Rules of Criminal Procedure was intended to be of jurisdictional stature and *sub silentio* overrule *United States* v. *Weissman*, *supra*. This Rule does not expressly limit the time at which a trial court may direct an acquittal, and accordingly, in conformity with general canons of construction applied to procedural rules or statutes pertaining to the judiciary, no such jurisdictional limitation may be read into it. *Fauntleroy* v. *Lum*, 210 U. S. 230, 234-235 (1908). Furthermore, the Notes of the Advisory Committee appended to Rule 29(a) indicate that no change in the law was intended by its adoption. Moreover, other rules governing federal criminal procedure and analogous procedural rules which have come before the courts have been held not to abrogate or circumscribe

the jurisdictional power of a trial judge, *Ex parte United States, supra; United States* v. *Apex Distributing Company,* 270 F. 2d 747, 754 n. 17 (9th Cir. 1959), and this Court has implicitly recognized the non-jurisdictional nature of Rule 29 by characterizing its violation as "an error of law." *Bryan* v. *United States,* 338 U. S. 552, 559 (1950).

E. Even in a normally appropriate situation, mandamus will not lie if appellate review is prohibited by statutory policy. In such cases, this Court has held that the statutory policy cannot be nullified through resort to mandamus in lieu of appeal. *Interstate Commerce Commission* v. *United States,* 289 U. S. 385, 394 (1933); *Ex parte Pennsylvania Company,* 137 U. S. 451 (1890). The Criminal Appeals Act contains no authorization for appeal by the Government from a judgment of acquittal. Its legislative history in the context of its common law background indicates a clear intent to confine the Government's right of criminal appellate review to those specific instances enumerated in that statute. *Carroll* v. *United States,* 354 U. S. 394, 398-407 (1957); *United States* v. *Mersky,* 361 U. S. 431, 446-453 (1960). As indicated by this Court in *United States* v. *Weissman,* 266 U. S. 377 (1924), this restrictive intent encompasses a prohibition against review of a directed judgment of acquittal, no matter how erroneous or precipitous. In view of this restrictive congressional and common law policy which is rooted in the constitutional safeguard against double jeopardy, the Criminal Appeals Act should be interpreted as prohibiting review of a judgment of acquittal by mandamus as well as appeal.

II.

Double jeopardy is a constitutional bar to the second trial ordered by the circuit court.

A. The plea of *autrefois acquit* is available to petitioner as protection against a second trial by virtue of the trial court's direction of a judgment of acquittal. The history of the plea, as incorporated in the Fifth Amendment, indicates that it is in no way impaired by any errors, irrespective of how extreme, that may have been committed in the course of a trial, including an arbitrary direction of an acquittal. *Green* v. *United States*, 355 U. S. 184, 188 (1957). State courts, which have had more occasion to consider the question of whether double jeopardy bars a second trial after an erroneous and premature direction of acquittal in the first trial, have repeatedly and uniformly held in the affirmative. The only three situations that have been recognized, either in English or American criminal jurisprudence, where a former acquittal is not a bar to a second trial, are not pertinent to the present case. Moreover, they involve situations where the defendant had never been in peril of a valid conviction or in actual danger of punishment and are, therefore, critically different from the present case where petitioner clearly was in such jeopardy.

B. Even if the acquittal directed by the district court was beyond its power or could be deemed the equivalent of an order of mistrial, petitioner may not be constitutionally subjected to a second trial. Petitioner, having been subject to the peril of a valid conviction and the actual danger of punishment, was concededly in jeopardy during the eight days of the trial and, in fact, from the time it was put to trial until the trial was terminated thirteen

days later. Furthermore, even if the acquittal, as the Government argues, be considered no more than an order of a mistrial, the result of permitting petitioner to be retried would be to give the Government a more favorable opportunity at a second trial to convict petitioner. It is clear that where, as in the present case, the trial has been progressing so favorably for the defendants that the trial court expressed its opinion that the jury would not convict, a mistrial cannot be for the effective protection of the defendant, *cf. Gori* v. *United States* 367 U. S. 364 (1961) but can only be of help to the prosecution whose case is going badly. A termination of a trial under these circumstances cannot be effective to deprive petitioner of the safeguard of the Fifth Amendment against a second prosecution. *Green* v. *United States*, 355 U. S. 184, 188 (1957). Nor can petitioner's motion for an acquittal be deemed to have waived his constitutional right against being "twice put in jeopardy." Petitioner did not ask for a mistrial and in fact would have vigorously opposed such "relief." Implying a fictional consent by petitioner to a mistrial not only runs contrary to the realities of the posture of the trial below but is also violative of the established principle that constitutional rights will not lightly be presumed to have been waived. *Glasser* v. *United States*, 315 U. S. 60, 70 (1942); *Green* v. *United States, supra* at pp. 191-197.

ARGUMENT

I.

It was improper for the court below to issue mandamus reviewing and vacating the judgment of acquittal directed by the trial court.

The jurisdiction of the circuit courts to issue writs of mandamus is wholly statutory and their power to issue the writ is derived from 28 U. S. C. §1651(a) (*infra*, Appendix A). This statute empowers the circuit courts to issue extraordinary writs, such as the writ of mandamus, only if "in aid of" their appellate jurisdiction, *Whitney* v. *Dick*, 202 U. S. 132, 136-137 (1906), and only if "agreeable to the usages and principles of law." *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 25 (1943). We will show that the issuance of the writ in this case was not "in aid of" the appellate jurisdiction of the court below (*infra*, pp. 21-22). We shall further show that the issuance of the writ was not "agreeable to the usages and principles of law" because (1) the writ cannot be used to review an exercise of judicial discretion by a trial court in passing on a legal issue in a case properly before it, no matter how erroneous such exercise of discretion may be (*infra*, pp. 22-24); (2) the trial court's exercise of discretion in directing an acquittal was justified (*infra*, pp. 24-32); (3) the trial court, even if in error, did not exceed its power in directing an acquittal (*infra*, pp. 33-46); and (4) the writ of mandamus cannot be used to nullify both the clear statutory and common law policies prohibiting appellate review by the Government of a judgment of acquittal in a criminal case (*infra*, pp. 47-52). For these reasons the issuance of the writ by the court below was improper and violated both the fundamental principles as to the nature of this extraordinary writ

and the restriction prohibiting the use of the writ as a substitute for appellate review when such review is otherwise precluded.

A. The Issuance of the Writ of Mandamus Was Not "In Aid Of" the Circuit Court's Appellate Jurisdiction.

Section 1651 of the Judicial Code, from which circuit courts derive their power to issue writs of mandamus, authorizes circuit courts to issue the writ only if it will be "in aid of" their jurisdiction.

The court below relied on *Ex parte United States*, 287 U. S. 241 (1932) as direct authority for its holding that the issuance of mandamus in the present case would be "in aid" of its appellate jurisdiction. However, in that case there was potential appellate jurisdiction existing at the time this Court directed the district court judge to perform his non-discretionary duty to issue a bench warrant for the arrest of a person duly indicted. In the present case there was no federal appellate jurisdiction "in aid" of which mandamus could be issued by the court below. The Government has no right to appeal from any judgment made during the course of a criminal trial except in those instances specifically authorized by statute. *United States* v. *Borden Company*, 308 U. S. 188, 192 (1939); *United States* v. *Sanges*, 144 U. S. 310 (1892). The Criminal Appeals Act, 18 U. S. C. §3731 (*infra*, Appendix A) contains no authorization for an appeal by the Government from a judgment of acquittal. The judgment of acquittal directed by the trial court extinguished whatever actual or potential jurisdiction may have existed in the court below to review even those aspects of a criminal case which are specifically enumerated in the Criminal Appeals Act. The defendants, of course, would have no reason to appeal their acquittal and in any event the maximum statutory time for appeal

had expired when the Government applied for the writ on November 3, 1960 (R. 1), forty-two days after the judgment of acquittal had been entered (R. 37). Federal Rules of Criminal Procedure, Rule 37(a)(2) (*infra*, Appendix A). Immediately prior to the Government's application for the writ there was no way for this case to come before the court below and the writ of mandamus cannot be used as a bootstrap to confer jurisdiction which does not otherwise exist. *Bath Co.* v. *Amy*, 13 Wall. 244 (1872); *Delaware L. & W. R. Co.* v. *Rellstab*, 15 F. 2d 137 (3rd Cir. 1926); *cf. Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375 (1938).

B. The Issuance of Mandamus by the Court Below Violates the Basic Principle That Mandamus Will Not Lie to Review the Exercise of Judicial Discretion by an Inferior Court.

The writ of mandamus cannot serve as a substitute for an appeal; it does not lie to review or correct errors committed by an inferior court in the exercise of its discretion, nor to compel a particular decision. Where a trial court has jurisdiction of a cause and the parties, the function of the writ is rather to require the trial judge to exercise his discretion by adjudicating the merits of the case, if he refuses to do so. *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, 381-83 (1953); *Morrison* v. *District Court*, 147 U. S. 14 (1893); *Ex parte Perry*, 102 U. S. 183 (1879); *Ex parte Loring*, 94 U. S. 418 (1877); *Ex parte Newman*, 14 Wall. 152, 165-166 (1872).

In *Ex parte Newman, supra*, at p. 169, this Court in refusing mandamus, said:

> "Superior tribunals may by *mandamus* command an inferior court to perform a legal duty where there is no other remedy, and the rule applies to judicial as well as to ministerial acts, but it does not apply at all to a judicial act to correct an error, as where the act

> has been erroneously performed. If the duty is unperformed, and it be judicial in its character, the mandate will be to the judge directing him to exercise his judicial discretion or judgment, without any direction as to the manner in which it shall be done. . . . "

In the present case it is clear that the trial court did not refuse to adjudicate an issue which it had a duty to decide. To the contrary, it was acting in a judicial capacity when it granted petitioner's motion for a directed judgment of acquittal. Any doubt there may be as to this is dispelled by the statement made by the trial court to the jury in passing upon defendants' motions for acquittal (R. 572-75).

Nor is this a case, as in *DeBeers Consolidated Mines* v. *United States*, 325 U. S. 212 (1945), where mandamus is proper because the trial court presumes to act while its jurisdiction over the person of the defendant is still in question,* or where, as in *United States Alkali Export Association* v. *United States*, 325 U. S. 196 (1945), the trial court may be the wrong tribunal in which the cause should be heard. Also readily distinguishable is *La Buy* v. *Howes Leather Co.*, 352 U. S. 249 (1957), where mandamus issued to prevent a trial judge from abdicating his judicial function by improperly referring a case before him to a master for decision. In *La Buy*, the mandamus performed the traditional function of requiring a judge to hear a case properly before him.

In sharp contrast with the foregoing decisions, the trial court in the present case concededly had jurisdiction of both the offense charged and the defendants, and rendered a decision on the merits of a terminal motion before it. On

* Moreover, in *DeBeers*, the trial court undertook to safeguard a non-existent Government right to money damages (the relief demanded being merely equitable) by a type of sequestration order which would normally have been immediately appealable but for its unprecedented form.

these facts, it is apparent that the mandamus issued only to correct an allegedly erroneous decision by the district court and thus performed the office of an appeal. By its terms, the writ vacated the judgment previously entered. Its effect was to compel a particular determination by the trial court of the motions for acquittal, that is, to deny them. This is not the function of the writ of mandamus. *Ex parte Newman, supra.*

No factual basis exists for any assertion that the trial court, in effect, granted only a "mistrial" and that the writ of mandamus merely issued to correct the form of the judgment entered. There was no motion before the trial court for a mistrial and the trial court had no intention of granting one. The posture of the trial, in view of the unfavorable impression created by the Government witnesses, was such that the defendants would in no event have requested nor agreed to a mistrial. This Court has repeatedly and consistently rejected previous efforts by the Government to have a fictitious label applied to a trial court's judgment in a criminal action for the purpose of obtaining review where no appellate right would otherwise exist. *Carroll* v. *United States,* 354 U. S. 394, 406 (1957); *United States* v. *Weissman,* 266 U. S. 377 (1924); *United States* v. *Oppenheimer,* 242 U. S. 85 (1916); *United States* v. *Carter,* 231 U. S. 492, 494 (1913).

C. The District Court's Direction of a Judgment of Acquittal Was Not Erroneous.

It is apparent from the decision of the circuit court that the consideration which led it to conclude that there had been no jurisdiction to direct an acquittal, was its reaction to what it regarded as improper conduct on the part of the trial judge. The court below was of the view that the trial judge had, by extensive questioning of the Government's witnesses, interfered to an unwarranted degree

in the trial, and had thereafter, completely without justification, criticized the prosecuting attorney for procuring, out-of-court, a change in the testimony of a Government witness.

We submit the record shows that the trial court's conduct throughout the trial was proper. Nor was the final action taken by the trial judge without justification.

Proof of the alleged criminal fraud and conspiracy charged by the Government, required, as a first prerequisite, intelligible explanations of technical matters such as how a radiosonde functioned and the nature of the testing procedures which were alleged to have been falsified. Obviously a verdict against the defendants could not be brought in or sustained unless a clear picture of the proper testing procedures had been given to the jury. The Government itself recognized this in its opening statement to the jury, saying (R. 70):

> "Before you can follow the testimony about the falsification of the tests you will have to know something about the instrument involved, how it was made and how it was to be tested . . ."

It was therefore entirely proper for the trial judge to undertake to clarify for himself and the jury this technical testimony as to the nature of the radiosonde and the procedures for testing it which the Government witnesses were presenting in an inarticulate and confusing manner (see *e.g.*, R. 146-47, 170-72, 359, 386-87).* See *Glasser* v. *United States*, 315 U. S. 60, 82 (1942); *United States* v. *DeFillo*, 257 F. 2d 835, 839-840 (2d Cir. 1958); *United States* v. *Amorosa*, 167 F. 2d 596, 600 (3rd Cir. 1948). In fact, such

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* Even the Government's documentary evidence, prepared by its witness Paliatto, with respect to the supposed organizational setup at petitioner's North Dighton plant (R. 96-97) was inaccurate and misleading (R. 482-483, 490, 507).

clarification was not only proper, but the duty of the trial court, particularly in view of the admission to the court made by Paliatto near the very beginning of his testimony, that he was inept at simple exposition comprehensible to laymen (R. 102). See *Ochoa* v. *United States*, 167 F. 2d 341, 344 (9th Cir. 1948); *United States* v. *Laurelli*, 187 F. Supp. 30, 34-35 (M. D. Pa. 1960).

Nor were the trial court's interjections during the course of the trial out of mere solicitude for the rights of the defendants. The trial judge aided the Government in phrasing questions in admissible form (*e.g.*, R. 87-90, 538), gave Government counsel considerable latitude in its questioning to enable the scientific aspects of the case to be brought out (*e.g.*, R. 142) and attempted to elicit by his questioning a correct and clear explanation of the complicated radiosonde tests (*e.g.*, R. 137-38, 191, 539). In fact the trial court, on several occasions, because of the incompetent presentation being made of the Government's case, offered the Government an opportunity to further rehearse the technical aspects of the case with Paliatto so that it would be comprehensible to the jury (R. 118, 148, 172).

The circuit court viewed the "cold" record as showing injudicious conduct on the part of the trial judge. But as was said by another circuit court in dealing with a similar complaint by a defendant as to a trial court's questioning and remarks in a criminal case:

> "It is impossible to gather from the cold record, particularly when it is in narrative form, the atmosphere of the trial itself, the manner in which the words were spoken, or the probable effect, if any, which they had upon the merits of the controversy." *Goldstein* v. *United States*, 63 F. 2d 609, 613 (8th Cir. 1933).

Moreover, even the "cold" record shows that the trial judge was extremely conscious of his judicial responsibility both to ensure that the proceedings were conducted in a manner in keeping with the gravity of a criminal trial (R. 166, 477-478, 573) and to provide a record intelligible to an appellate court (R. 98, 148, 178, 504). If the record makes it appear that the trial court was on occasion sharp in its comments, or seemed impatient, or expressed amusement at the peculiar use of language by a Government witness, this was not altogether without justification (see, *e.g.*, R. 191, 355-357, 549; compare R. 543-544 with R. 546-547; R. 135-136). Moreover, as Judge Learned Hand observed in *United States* v. *Warren*, 120 F. 2d 211, 212 (2d Cir. 1941) in rejecting a defendant's appeal which alleged that a fair trial had been prevented by the district court's constant comments and interruptions:

> " . . . We have examined the passages of which the accused complains, and, while at times the judge was somewhat curt in his rulings, it would be unwarranted to hold that his bearing towards the accused could have really prejudiced him with the jury. It would be idle to take up the details of a criticism which as a whole appears to us unfounded. Indeed, the disposition of courts to reverse judgments because of minor excesses in the exercise of the judge's authority at the trial has much abated; separate passages cut from their context and from the trial as a whole, often have an apparent importance which in fact they do not deserve. We do not of course mean that we may ever abdicate our essential duty of insuring an impartial conduct of the trial; that is quite as important as an understanding of the rights and liabilities involved—indeed, in the end even more so—but nothing conduces less to it than an over jealous scrutiny of every word that may fall from the judge's mouth."

The unreliability of the testimony of the Government witnesses Paliatto and Rosenholm is evident (see, *e.g.*,

R. 135-136, 191, 232-234, 255, 313, 357, 400-01; and compare R. 269 with R. 268, R. 353 with R. 358, R. 469 with R. 470, R. 459-460 with R. 461-462; R. 543-545 with R. 546-548 and R. 551-552 with R. 559). The full extent of the unfavorable impression made by them obviously cannot be gained merely from the record, which does not convey the demeanor of the witnesses nor the inflections, delays or other nuances of their oral testimony.* See *Brown* v. *Capital Transit Co.*, 127 F. 2d 329, 330 (D. C. Cir. 1942). The significance of this factor in the present case is indicated by Judge Wyzanski's statement introductory to his recommendation that the case be *nolle prossed* (R. 360):

> "The cold record perhaps inadequately conveys the total picture as it has developed in the last few days of testimony, and in particular the testimony of the witness Palliotto [sic], who is on the stand."

The testimony of the Government witnesses Paliatto and Rosenholm fully justified the district court's finding that they had "a lamentable lack of awareness or lack of capacity in connection with their testimonial obligations" (R. 573). The circuit court agreed that the testimony of the Government witnesses was "confused and conflicting" and "not entirely reliable" but stated that this was in no minor part due to the trial court's extensive questioning (286 F. 2d at 560, R. 50-51). But a trial judge is not a mere automaton at a criminal trial, and as previously shown (*supra*, at pp. 25-26) it was not only proper but the trial court's duty, under the circumstances, to actively question the witnesses. Moreover, it was not the trial court's questioning which, for example, caused the witness

* In the present case the "grudging testimony" and "hostility" of Paliatto towards the defendants conveyed by the tone and manner in which he spoke, is revealed by the record only because it manifested itself to such a degree that the trial court found it necessary to caution the witness (R. 335).

Rosenholm to change a whole line of testimony as to test cards supposedly improperly given to another co-conspirator (Compare R. 546-548 with R. 543-545) nor to shift the date of an alleged conversation in order to bring it within the period of the indictment (Compare R. 559 with R. 552). And it was not the trial judge's questioning which made Paliatto first testify that he had not destroyed allegedly falsified test tapes pertaining to the radiosonde units after the F.B.I. investigation was initiated (R. 352-353), but then finally admit that he had done so (R. 355, 358).* Nor was it the trial court which, in this criminal fraud case, induced Paliatto to confusingly misuse the term "spurious" when he meant "instantaneous" in referring to the radiosonde test signals (R. 135-136). In fact it was the trial court's interjection which clarified this (R. 135-136).

The trial court's action, taken on the eighth day of the trial after hearing testimony of three Government witnesses, was in no way precipitous. The presentation of the Government's case was, from the beginning, inept and confusing. At the close of the second day of testimony, immediately after the Government had given the jury "misleading exhibits" (R. 171), the trial court was moved to state (R. 172):

> "I am quite prepared to take drastic action in connection with this case. I think the best thing would be

* Paliatto handicapped the defense by destroying allegedly falsified test tapes after he made his complaint to the F.B.I. (R. 197-198, 358). Although the trial court did not expressly advance the destruction of the test tapes as a reason for granting the motion for acquittal, this ground should have been considered by the circuit court and may still be urged before this Court in support of the trial court's action. *United States* v. *Jones*, 174 F. 2d 746, 748 (7th Cir. 1949); *Smith* v. *United States*, 173 F. 2d 181, 184-85 (9th Cir. 1949). The destruction of the test tapes is closely analogous to the loss of documents, which was held to warrant a final dismissal of the case against the Government in *United States* v. *Heath*, 260 F. 2d 623 (9th Cir. 1958).

> to give you [Government counsel] a recess for the balance of the day, and on Monday come in at 10:00 o'clock, and if the case at that time, in connection with this technical matter, is not so prepared that I feel the jury is getting a fair picture I am not going to submit anybody to the risks of this kind of confusion in this very grave case in which the charge is that the defendants have confused the Government with false and misleading reports."

Moreover, before the trial judge directed the acquittal, he and the jury had been exposed to approximately seven days of testimony by two key Government witnesses, Paliatto and Rosenholm. Paliatto, in particular, was an indispensable Government witness. Early in the case the Government told the court that Paliatto was going to testify "both" as an "expert" on the technical explanatory matters and as a witness to the "particular occasion when the crime was committed" (R. 80; see also R. 365). He was the chief Government inspector at petitioner's plant with full responsibility for conducting and supervising the radiosonde tests which were allegedly falsified (R. 157, 253-54, 274); and it was his complaint to the F.B.I. which resulted in the indictment in this case (R. 353-354). After listening for five days to Paliatto's confused and contradictory testimony, the trial court was convinced that the unfavorable impression created was ineradicable, that Paliatto was completely discredited as a witness and that the jury would not return a conviction (R. 360-362, 364).

It was against this background, supplemented by the further testimonial unreliability shown by the Government witness Rosenholm, that the incident occurred on the eighth day of the trial while Rosenholm was on the stand, which triggered the determination by the trial judge that an acquittal was necessary in the interests of justice. Rosenholm was an alleged co-conspirator who had not been

indicted (R. 544). Essential to the Government's charge that there had been a conspiracy to conceal the alleged fraud was a conversation said to have taken place between Rosenholm and a representative of petitioner (R. 557).* Rosenholm initially placed this conversation as having taken place in February, 1958 (R. 552), which was subsequent to the period—September, 1956 to November, 1957—covered by the indictment (R. 6-23). The next morning, when he resumed the stand, Rosenholm changed the date of this alleged conversation to September, 1957 in order to bring it within the period of the indictment (R. 559). On cross-examination it was brought out that this change in Rosenholm's testimony was suggested by Government counsel to Rosenholm an hour or so before the trial had resumed that morning (R. 567-568). At this point, in the context of the Government's failure to present a fair and intelligible picture of the necessary first part of its case and the testimonial deficiencies of two key Government witnesses who were to be recalled in further support of the second part of the Government's case (R. 238, 365, 565), the trial court invited, considered and granted the defendants' motions for acquittal (R. 570, 572-575).

The court below cites *Frazer* v. *United States*, 233 F. 2d 1 (9th Cir. 1956) as authority for its view that the prosecuting attorney had done nothing improper. However, in the *Frazer* case, the prosecutor initiated the out-of-court discussion with his witness out of solicitude for the rights of the defendant rather than to advance his case. The prosecutor, in that case, made the witness correct her untrue

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* The prosecuting attorney's statement to the trial court makes this clear: "In regard to this, the Government's theory is that Teichman, an agent of the company, is apprised as to what is going on; that thereafter no steps were taken. The people involved are retained. Moreover, through other witnesses, that he affirmatively attempts to conceal what is going on."

statement that she was not receiving any compensation for her appearance on behalf of the Government. This is completely different from the present case. Here the Government induced its witness, during a recess, to change his testimony so as to lay a foundation for an otherwise inadmissible conversation essential to the Government's charge that petitioner had been apprised of the alleged fraudulent testing and had thereafter become party to a conspiracy to conceal it from the Government (R. 557, 565).

Another able district court judge recently had occasion to indicate that he would have reacted with no less indignation than did Judge Wyzanski to a showing that the Government had, off-the-witness stand, induced its witness, an alleged co-conspirator, to make a similar change in testimony. *United States* v. *Dillon*, 183 F. Supp. 541, 542 (S. D. N. Y. 1960).

A federal trial court is charged both with the responsibility of ensuring that criminal proceedings are conducted with solicitude for the essential rights of the accused, *Gori* v. *United States*, 367 U. S. 364 (1961); *Glasser* v. *United States*, 315 U. S. 60, 71 (1942), and with the efficient and expeditious administration of criminal justice *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151, 152 (D. D. C. 1956). As Judge Wyzanski said (R. 575):

> "It is not the duty of a court to see that every guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law."

In light of these principles, it was not erroneous for the trial court in the present case to have directed an acquittal

D. Even if the District Court Committed Error It Was Not Acting Beyond Its Jurisdiction in Directing a Judgment of Acquittal.

The court below was unanimous in holding that the trial court had no jurisdiction to direct an acquittal. However, the circuit court sharply differed in its reasons for reaching this conclusion. The majority opinion took the view that, prior to the completion of the Government's case, the trial court "had no power, that is to say, jurisdiction" to terminate the trial with finality against the Government, whether for alleged insufficiency of the evidence or for the alleged improper conduct of Government counsel (286 F. 2d at 560, 563, R. 50, 55). The majority apparently accepted—at least in part—the Government's contention that the judgment of acquittal was a "nullity" because, under the circumstances of the case, the Government was deprived of its right to a jury trial and because Rule 29(a) of the Federal Rules of Criminal Procedure abrogated the trial court's power to direct an acquittal.

Judge Aldrich disagreed with the majority's conclusion that the trial court had no power to direct an acquittal prior to the close of the Government's case based on alleged deficiencies in the evidence (286 F. 2d at 565-566, R. 59-62). However, he was of the opinion that the sole reason for the action taken was the court's belief that Government counsel had acted improperly in procuring a change in the testimony of Rosenholm during a recess (286 F. 2d at 568, R. 65). This reason, according to Judge Aldrich, afforded no jurisdictional basis for a direction of acquittal (286 F. 2d at 567, 568, R. 62-64).

We submit that Judge Aldrich was mistaken in his view that the improper conduct of Government counsel was the sole reason for the trial court terminating this criminal case. (See discussion, *supra*, pp. 27-31.) Undoubtedly,

it was Government counsel's conduct that was the "last straw", particularly since it involved a further demonstration of the unreliability of the testimonial capacity of Rosenholm. However, it is also clear that Judge Wyzanski was moved in large measure by what he viewed as the incurable deficiencies in the Government's presentation (R. 573, 575), which earlier in the case had prompted him to consider taking "drastic action in connection with this case" (R. 172) and, subsequently, to recommend to the Government that it *nolle prosse* the case because he believed that the jury would not convict, and if it did, that he would have to set aside such a conviction (R. 359, 362). But in any event, even if Judge Aldrich is correct in stating that the trial court's action was motivated solely by the conduct of Government counsel, it does not follow that there was no jurisdiction to acquit for this reason.

We will show that (1) the decision of the circuit court conflicts with the established principle that a district court in a criminal case has inherent power to conclusively terminate the trial against the Government at any time it believes, even if erroneously, that the interests of justice so require; (2) that the Government was not deprived of a right to a jury trial in the present case; and (3) that Rule 29(a) of the Federal Rules of Criminal Procedure has no impact on the power of a trial court to direct an acquittal prior to the close of the Government's case.

(1) *A District Court Has the Inherent Power to Direct a Judgment of Acquittal at Any Stage of a Criminal Trial.*

The court below improperly magnified into jurisdictional proportions the errors which it believed the trial court committed. The opinion of the circuit court intimates that in applicable situations a trial court has the power to direct an acquittal prior to the close of the Government's

case (262 F. 2d at 562, R. 54-55). The court below nevertheless held that in the circumstances of the present case this power did not exist. However, existence of the power to decide a legal issue cannot turn upon whether a particular case or set of circumstances warrants its exercise. The power to decide means the power to decide wrongly, no matter how serious and fundamental the error may be to the rights of a party. In *Lamar* v. *United States*, 240 U. S. 60, 64-65 (1916), this Court said:

> "Jurisdiction is a matter of power, and covers wrong as well as right decisions. . . . And nothing can be clearer than that the district court, which has jurisdiction of all crimes cognizable under the authority of the United States . . . acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong."

Similarly, in *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, 382 (1953), in holding that the issuance of mandamus was improper, this Court said:

> "The contention is that in acting on the motion and ordering transfer, he [the district court judge] exceeded his legal powers and this error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors."

Both authority and reason support the conclusion that a district court, having cognizance of the offense charged and the defendants, does have the inherent power to direct a judgment of acquittal at any stage of the trial. Directly in point is this Court's decision in *United States* v. *Weissman*, 266 U. S. 377 (1924), where Mr. Justice Holmes, speaking for a unanimous court said (at pp. 378-79):

> "It is argued that the verdict is a nullity because nothing had been submitted to the jury,—no evidence,

> not even an opening statement; and that the judgment should be treated as in substance sustaining a demurrer to the indictment or quashing it . . . .
> . . . [I]f directing the verdict was wrong, it certainly was not beyond the jurisdiction of the court. The jury were there and the prisoners before them; and, so far as jurisdiction is concerned, it did not matter whether evidence had been put in or not. We stop at the point of jurisdiction, the want of which would be the only pretext that could be offered for going behind the literal meaning of the [Criminal Appeals Act]. But we do not mean to imply that an opening by counsel or the offer of evidence is necessary in order to justify directing a verdict of not guilty; there are other cases in which it is done."

Although, in the *Weissman* case, the Government attempted to obtain review by a writ of error rather than mandamus, the Court's reasoning is equally applicable to the present case on the issue of whether an allegedly precipitous and arbitrary direction of acquittal may be considered as a jurisdictional defect and the acquittal therefore treated as a "nullity".

In the relatively few other cases where any question has been raised before a federal court concerning the power of a trial court in a criminal case to direct a judgment of acquittal, this power has been uniformly presumed. *Kepner* v. *United States*, 195 U. S. 100, 129 (1904); *United States* v. *Sanges*, 144 U. S. 310 (1892); *United States* v. *Heath*, 260 F. 2d 623, 626 (9th Cir. 1958); *Umbriaco* v. *United States*, 258 F. 2d 625, 626 (9th Cir. 1958); *District of Columbia* v. *Burns*, 32 App. D. C. 203, 204-05 (D. C. Cir. 1908); *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151, 152 (D. D. C. 1956). In the landmark case of *United States* v. *Sanges*, *supra*, this Court gave its approval to the following language (144 U. S. at 315):

> "The rule seems to be well settled in England, that in criminal cases a new trial is not grantable to the Crown after verdict of acquittal, even though the acquittal is founded on the misdirection of the judge. This is the general rule, and obtains in the states of our Union. It excludes a rehearing after acquittal upon errors of law, and therefore, it would seem, denies also a rehearing upon judgments of the court upon questions of law, even when the jury have not passed upon the guilt or innocence of the prisoner."

Judge Aldrich in the court below similarly recognized that "[i]n the absence of any contrary authority, it seems inherently reasonable to conclude that at whatever stage a fatal deficiency in the government's evidence irrevocably appears, the court is empowered to acquit" (286 F. 2d at 566, R. 60).

The courts of the several states which have considered the question of the power of a trial court in a criminal case to direct an acquittal, even arbitrarily, have also uniformly upheld its existence. See *e.g.*, *Commonwealth* v. *Adkins*, 171 Ky. 299, 188 S. W. 401 (1916); *State* v. *Thomson*, 76 N. D. 125, 34 N. W. 2d 80 (1948); *State* v. *Kelsey*, 49 N. D. 148, 190, N. W. 817 (1922); *People* v. *Goldfarb*, 152 App. Div. 870, 138 N. Y. Supp. 62 (1st Dept. 1912), *aff'd* 213 N. Y. 664 (1914); *Belter* v. *State*, 178 Wisc. 57, 189 N. W. 270 (1922).

Relevant to the present case is the well reasoned opinion by the Supreme Court of North Dakota in *State* v. *Thomson*, *supra*, in which the court said (at 34 N. W. 2d p. 96):

> "When a criminal action is tried to a jury it is the duty of the trial court to decide all questions of law which may arise in the course of the trial and to instruct the jury as to the law of the case, and it is for the jury to determine all questions of fact . . . . And where in such case there is competent evidence reason-

> ably tending to show that the accused is guilty of the offense charged, it is the duty of the court to submit all questions of fact to the jury for determination and the court is not authorized to advise or instruct the jury to return a verdict of acquittal. Yet, if the trial court in such case misconstrues a statute, applies the wrong rule of law, or places an erroneous construction on the evidence and as a consequence erroneously advises or instructs the jury to return a verdict of not guilty, such erroneous and unauthorized action on the part of the trial court does not constitute an act without or in excess of jurisdiction and does not render the verdict a nullity but the verdict operates as an acquittal of the defendant even though the result is that a defendant clearly guilty will go without any punishment whatsoever."

It is clear that a trial court has power to direct an acquittal even on the opening statement of the Government. See *Best* v. *District of Columbia*, 291 U. S. 411, 415 (1934); *Oscanyan* v. *Winchester Repeating Arms Co.*, 13 Otto 261, 263 (1881); *McGuire* v. *United States*, 152 F. 2d 577, 580 (8th Cir. 1945); *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151, 152 (D. D. C. 1956). When an opening statement is augmented by the introduction of evidence there is even more reason to sustain the existence of the trial court's power to summarily terminate the proceedings. Moreover, a trial court has the power in a criminal case to terminate the case with finality against the Government even prior to the impaneling of a jury, *Carroll* v. *United States*, 354 U. S. 394 (1957); *United States* v. *Heath*, 260 F. 2d 623 (9th Cir. 1958), and to direct an acquittal despite a conviction returned by a jury. *Ex parte United States*, 101 F. 2d 870 (7th Cir.), *aff'd sub nom. United States* v. *Stone*, 308 U. S. 519 (1939); *Umbriaco* v. *United States*, 258 F. 2d 625, 626 (9th Cir. 1958). It is unreasonable and illogical to hold that the trial court's

power to terminate a criminal proceeding with finality against the Government prior to or at the outset of the trial, after the close of the Government's case and even after a jury verdict of conviction, vanishes in the interim period between the Government's first witness and its last witness.

This inherent power of a trial court to direct an acquittal must encompass the power to acquit for any reason whatsoever and certainly for any reason related to the conduct of the trial before it. Judge Aldrich, in the court below, concedes that a trial court has the power to decide, however erroneously, that the conduct of the case by the Government is improper, but contends that there is no power to acquit for this reason (286 F. 2d at 567, R. 62). There is no authority for such a restrictive view of a trial court's power, and it is inconsistent with the fundamental principle that a trial court has the inherent power to take whatever action in respect of a cause before it is, in its opinion, necessary to further the interests of justice. *United States* v. *Weissman*, 266 U. S. 377, 379 (1924). See also *Oscanyan* v. *Winchester Repeating Arms Co.*, 103 U. S. 261, 263 (1881); *United States* v. *Apex Distributing Company*, 270 F. 2d 747, 755-756 (9th Cir. 1959); *United States* v. *Heath*, 260 F. 2d 623, 625-626, 632 (9th Cir. 1958); *cf. Gori* v. *United States*, 367 U. S. 364 (1961).

No statute or rule expressly prohibits a federal trial judge, in a criminal case, from directing an acquittal because of the improper conduct of Government counsel.* Nor are a district court's powers limited in respect of a criminal case properly before it to those expressly set forth in the

* This alone makes completely inapposite the reliance placed by the circuit court on *Ex parte United States*, 242 U. S. 27 (1916) where mandamus was held to lie to require a district court judge to perform a non-discretionary duty of imposing a sentence after conviction which he had refused to do in violation of a "plain legislative command" (242 U. S. at 42).

governing procedural rules. *United States* v. *Heath*, *supra*, at p. 632; *Johnston* v. *Marsh*, 227 F. 2d 528, 531 (3rd Cir. 1955).

The circuit court's conclusion as to the non-existence of a power to acquit because of improper conduct by Government counsel, laid heavy emphasis upon the trial court's reference to an "elementary rule" which the trial judge believed the Government counsel had violated by inducing Rosenholm, off the witness stand, to change his previous testimony on a vital point (286 F. 2d at 562, 568, R. 53, 64-65). According to the court below, no such "rule" exists (286 F. 2d at 562, 567, 568, R. 53, 63-65). We believe that the trial court was referring to the rule of exemplary fairness to which this Court, in other situations, has said the Government must conform in its preparation and prosecution of a criminal case. In *Berger* v. *United States*, 295 U. S. 78, 88 (1935) this Court stated:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones."

If the trial court improperly applied this rule to the particulars of Government counsel's conduct in the present case, it is no different than any other situation where a trial court, in a criminal case, misapplies a rule of law or statute to the case before it. Such misapplication could not oust

the trial court of jurisdiction. *United States* v. *Weissman*, 266 U. S. 377 (1924); *In re Eckart*, 166 U. S. 481, 483 (1897); *District of Columbia* v. *Burns*, 32 App. D. C. 203, 204-205 (D. C. Cir. 1908).

This Court's recent decision in the case of *Gori* v. *United States*, 367 U. S. 364, 370 (1961) was premised on the desirability of leaving trial judges free to "exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused." If, as Judge Aldrich concedes, a trial court has the power to take some action in respect of alleged misconduct by Government counsel, then it must have the power to decide on the form of the action, *i.e.*, whether under "the immediate exigencies of trial" in a particular case, "the effective protection of a criminal accused" would be better served by an acquittal rather than a mistrial.

It may be contended that a trial court's power to acquit in a criminal case should be limited since situations may be conjured up in which justice might be thwarted by its exercise; *e.g.*, for a wicked purpose or out of a whim completely unrelated to the trial.* However, basing the determination of whether a direction of acquittal (or for that matter whether any other ruling by a trial court during a criminal trial) is a "nullity" upon an inquiry into the particular motives for a trial court's action will not protect against a hypothetical wicked or capricious judge. The real reasons for any such action can be readily hidden behind silence or a pretended rationale, or the action deferred to a stage in the proceeding at which it would concededly become non-reviewable. The most effective protec-

* There is no such suggestion advanced in the present case.

tion against these imaginary evils, consistent with our system of criminal justice, is the high standard of our federal judiciary, and in the abnormal case, the remedy of impeachment.* On the other hand, it is the circuit court's broad equating of error with lack of jurisdiction which poses a real danger to our criminal law administration by its encouragement to collateral attack, unlimited in time or place, on an unpredictable number of judicial rulings made during a criminal trial and on an unpredictable number of past and future judgments until now regarded as final.

(2) *The Government Was Not Deprived of a Jury Trial in the Present Case.*

The court below apparently accepted, at least in part, the Government's argument that the action of the trial court in terminating the case at an allegedly premature stage defeated the Government's "fundamental" right to a trial by jury.** It is not clear that the Government has such a right, but assuming, *arguendo*, its existence, such a right means a trial before a judge and a jury with the judge left free to decide all issues of law, including the sufficiency of a motion for acquittal. *Ex parte United States*, 101 F. 2d 870, 874-877 (7th Cir. 1939), *aff'd sub nom. United States* v. *Stone*, 308 U. S. 519 (1939). See *Sunal* v. *Large*, 332 U. S. 174, 182 (1947). It is perhaps worthy of note that the Government is now advancing the same proposition which it so vigorously opposed before this Court in *Roche*

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* We will also show (*infra*, pp. 47-52) that the "risk of judicial arbitrariness" during a criminal trial is imposed on the Government. *Cf. Gori* v. *United States*, 367 U. S. 364, 373 (1961) (dissenting opinion).

** Gov't Br. below, pp. 30-33.

v. *Evaporated Milk Association*, 319 U. S. 21 (1943), where it successfully contended:*

> "The right to trial by jury means a trial before a judge and jury as contrasted to a trial before a judge alone. For in jury trials, the judge and jury together, rather than the jury alone, constitute the tribunal. Herron v. Southern Pac. Co., 283 U. S. 91, 95. It is the function of the court to determine matters of law even when a jury is sitting. . . . If the court holds, on demurrer or other appropriate motion, that no cause of action is stated, the case never goes to the jury. This does not mean that the proceeding has not been heard before the proper tribunal, for the court had jurisdiction to pass upon the legal issues. And even if the judge's ruling, which prevented the issue from reaching the jury side of the tribunal, may have been erroneous, the losing party has not been deprived of its right to trial in the appropriate forum.
>
> "Accordingly, no extraordinary remedy, such as mandamus, is available to him. If this were not so, every decision sustaining a demurrer or directing a verdict in an action at law could similarly be treated as a denial of a trial by jury, subject to correction by mandamus if the appellate court thought it erroneous. . . ."

In support of its conclusion that the judgment of acquittal was a nullity because the Government had been prevented from presenting all its evidence, the majority in the court below relied on *Ex parte United States*, 287 U. S. 241 (1932). However, a judge's refusal to perform the ministerial and statutorily required duty of issuing an arrest warrant after an indictment has been properly returned, which prevents a case from being brought before a court for trial in the first instance, is hardly analogous

* Record on Appeal to the United States Supreme Court, Government Brief pp. 15-16.

to an alleged erroneous determination on an issue of law by a trial judge, which terminates a criminal trial properly before him on the eighth day of actual trial.

(3) *Rule 29(a) of the Federal Rules of Criminal Procedure Does Not Affect a Trial Court's Power to Direct an Acquittal at Any Stage of the Proceeding.*

The majority opinion of the court below suggests that the power of a trial court to acquit after the close of the Government's case does not exist prior to such time because of the second sentence of Rule 29(a) of the Federal Rules of Criminal Procedure, which reads:

> "The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."

This suggestion in the majority opinion of the court below finds no support in the general canons of construction applied to statutes or rules pertaining to the judiciary. Nor does the purpose for the adoption of the second sentence of Rule 29(a) stated in the Notes of the Advisory Committee appended to this Rule, or the interpretation given by the courts to other analogous procedural rules, lend any support to such a contention.

The general principle applied in construing rules or statutes regulating judicial proceedings, even where they are phrased in restrictive terms, is to avoid reading jurisdictional significance into them. *Burnet* v. *Alvarez*, 226 U. S. 145, 147 (1912); *Fauntleroy* v. *Lum*, 210 U. S. 230, 234-35 (1908). Rule 29(a) does not expressly prohibit a district court judge from directing an acquittal at any stage of the

proceeding. The only mandatory language found in the Rule states that the court "shall order" an acquittal if the evidence at the close of the Government's case is insufficient to sustain a conviction. Were Rule 29(a) considered as mandatory and jurisdictional, then, if a trial court at the close of the Government's case erroneously refused to direct an acquittal when the evidence was inadequate to sustain a conviction, following the Government's theory, this would oust the trial court of jurisdiction and make a nullity of the further proceedings. But this is obviously not the consequence of such an improper refusal by the trial court to order an acquittal. See *Bryan* v. *United States*, 338 U. S. 552, 559 (1950); *Greenberg* v. *United States*, 280 F. 2d 472, 477 (1st Cir. 1960); *cf. Berkowitz* v. *United States*, 90 F. 2d 881, 884 (8th Cir. 1937) (violation of rule requiring sentencing without delay does not void the sentence).

The Notes of the Advisory Committee appended to Rule 29(a) do not indicate that the second sentence of this Rule was intended to in any way modify the previous practice, and it has been said that the rule merely reenacts "what had been the law before." *United States* v. *Outer Harbor Dock & Wharf Co.*, 124 F. Supp. 337, 339 (S. D. Calif. 1954). The only purpose stated for incorporating this language in the Rule was to follow the wording of Section 410 of the New York Code of Criminal Procedure. Prior to the adoption of the Federal Rules of Criminal Procedure in 1946, the New York courts apparently had not considered this language to make a "nullity" of an acquittal directed by a trial court prior to the close of the prosecution's case. *People* v. *Goldfarb*, 152 App. Div. 870, 138 N. Y. Supp. 62 (1st Dept. 1912), *aff'd* 213 N. Y. 664 (1914); *People* v. *Merrill*, 156 Misc. 637, 282 N. Y. Supp. 809 (1935).

Moreover, the federal courts have consistently taken the position that rules of criminal procedure do not affect the

jurisdiction otherwise possessed by a court.* *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151, 152 (D. D. C. 1956) (Rule 29); *Ex parte United States*, 101 F. 2d 870, 876-878 (7th Cir. 1939), *aff'd sub nom. United States* v. *Stone*, 308 U. S. 519 (1939); *United States* v. *Heath*, 260 F. 2d 623, 632 (9th Cir. 1958); *United States* v. *Apex Distributing Company*, 270 F. 2d 747, 754 n. 17, 755, 756 (9th Cir. 1959); *Johnston* v. *Marsh*, 227 F. 2d 528, 531 (3rd Cir. 1955); *Berkowitz* v. *United States*, 90 F. 2d 881, 884 (8th Cir. 1937); *cf. In re Johnson*, 72 S. Ct. 1028, 96 L. Ed. 1377 (1952) (opinion in chambers by Mr. Justice Douglas). These decisions make it clear that a district court has broad discretionary powers, which exist outside the framework of procedural rules, to act in respect of a case properly before it, and that the rules, in no event, import jurisdictional limitations.

In *Bryan* v. *United States*, 338 U. S. 552 (1950), this Court, in considering Rule 29 of the Federal Rules of Criminal Procedure, said (at p. 559):

> "Of course the Court of Appeals must determine whether the Rule has been observed by the District Court. If it finds that the District Court has erred and has not properly applied the Rule, that is an error of law for which the Court of Appeals may reverse and remand."

In so characterizing a district court's failure to follow Rule 29 merely as an "error of law," this Court appears to have implicitly recognized that jurisdictional significance does not attach to such failure.

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* Rules pertaining to the procedure to be followed by the courts in civil cases have been similarly construed as not going to the court's jurisdiction. *E.g.*, *Ex parte First National Bank*, 228 U. S. 516, 518 (1913); *Matter of Hawkins*, 147 U. S. 486 (1893); *Ex parte Whitney*, 13 Pet. 404 (1839) (holding mandamus to be inappropriate merely to correct violations of procedural rules).

E. Mandamus Does Not Lie Where Both Statutory and Common Law Policy Prohibit Appellate Review.

The issuance of the writ by the court below directly conflicts with the congressional policy of non-reviewability of a judgment of acquittal as well as the historic common law prohibition against appellate review of criminal cases at the instance of the Government. This Court has in other analogous situations held inappropriate the issuance of extraordinary writs, such as mandamus, where they have been sought to circumvent a congressionally established policy against appellate review even though the statutory prohibition against review by way of appeal did not in terms refer to mandamus. *Ex parte Pennsylvania Company*, 137 U. S. 451 (1890) (remand statute); *In re Park & Tilford*, 245 U. S. 82, 86 (1917) (finality of decisions of the Court of Customs Appeals); *Interstate Commerce Commission* v. *United States*, 289 U. S. 385, 394 (1933) (finality of I. C. C. decisions); *United States* v. *Rice*, 327 U. S. 742 (1946) (remand statute). In the *Pennsylvania Company* case, *supra*, this Court, in addressing itself to a statute which provided that no appeals could be taken from orders remanding proceedings to a state court, said (at p. 454):

> "In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus: and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public

> point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution', in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

The applicability of this principle to federal criminal appellate jurisdiction was early illustrated in *Ex parte Gordon*, 1 Black. 503 (1862). In *Ex parte Gordon*, this Court, at a time when it had no general criminal appellate jurisdiction, refused a prerogative writ sought by a defendant under sentence of death on the ground that the ordinary process of appellate review had not been made available by Congress.

Few precepts are more firmly established in federal jurisprudence than the limited and strictly statutory nature of the Government's right to appellate review in a criminal case. For example, Section 6 of Chapter 517 of the Judiciary Act of March 3, 1891, 26 Stat. 828, which conferred appellate jurisdiction in criminal cases on the circuit courts of appeal created by that Act, did not expressly preclude the Government from a right of appeal. Nevertheless, in *United States* v. *Sanges*, 144 U. S. 310, 323 (1892) this Court said:

> "The provisions of section 6, giving the Circuit Courts of Appeals in general terms appellate jurisdiction of criminal cases, says nothing as to the party by whom the writ of error may be brought, and cannot therefore be presumed to have been intended to confer upon the government the right to bring it.

> "In none of the provisions of this act, defining the appellate jurisdiction, either of this court, or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States."

It was not until 1907 that Congress saw fit to give the Government any right whatsoever to obtain appellate review in a criminal case. The limited appellate rights in criminal cases which the Government now has by virtue of the present Criminal Appeals Act were initially conferred upon the Government in substantially the same form by the Criminal Appeals Act of 1907.*

This Court has so frequently and forcefully enunciated the restricted nature of the Government's appellate criminal rights and so often and carefully traced the legislative and historical bases for these limitations, that no extensive inquiry into the congressional purpose underlying the Criminal Appeals Act is required by way of demonstrating the congressional intent to narrowly confine criminal appeals by the Government. See *e.g.*, *Carroll* v. *United States*, 354 U. S. 394 (1957); *United States* v. *Borden Company*, 308 U. S. 188 (1939); *United States* v *Dickinson*, 213 U. S. 92 (1909); *United States* v. *Mersky*, 361 U. S. 431, 444-53 (1960) (dissenting opinion of Mr. Justice Frankfurter).

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* The subsequent amendments to the Criminal Appeals Act in 1942 (56 Stat. 271), in 1948 (62 Stat. 844), and in 1949 (63 Stat. 97), have been essentially formal changes, see *United States* v. *Mersky*, 361 U. S. 431, 445, n. 1 (1960), and are in no way indicative of any Congressional intent to broaden the Government's appellate rights in criminal cases beyond those specifically enumerated in the Act.

In *Carroll* v. *United States*, *supra*, this Court said (at pp. 400-02):

> ". . . [I]n the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored. The history shows resistance of the Court to the opening of an appellate route for the Government until it was plainly provided by the Congress, and after a close restriction of its uses to those authorized by the statute . . . When the Congress responded to the problems of such cases [prosecutions dismissed because of interpretation or invalidation of a statute], in the Criminal Appeals Act of 1907, now 18 U. S. C. §3731, it did so with careful expression of the limited types of orders in criminal cases as to which the Government might thenceforth have review."

A fair reading of the import of the legislative history of the Act, as noted in the above cited decisions of this Court, indicates a complete absence of any congressional intention to give the Government a right to have a verdict of acquittal vacated or to permit a defendant, once acquitted under any circumstances, to be tried again. See *e.g.*, H. R. REP., No. 2119, 59th Cong., 1st Sess. 1, 3 (1906); 41 CONG. REC. 2748 (1907) ("But when a man has been once tried and acquitted that ought to be the end of it, jeopardy or not". Statement of Senator Rayner); 41 CONG. REC. 2752 (1907) (remarks of Senator Knox, a principal spokesman for the Act); 41 CONG. REC. 3046 (1907) (remarks of Rep. Jenkins); see also Kurland, *The Mersky Case and the Criminal Appeals Act*, 28 U. CHIC. L. REV. 419, 446-455 (1961). Moreover, there can be little dispute that the legislative aim was to leave "a few extra weights" on the defendant's side of the scales of justice. *United States* v. *Koenig*, 290 F. 2d 166, 167 (5th Cir. 1961).

Furthermore, Congress has in no way indicated any intent to limit the full sweep of the decision in *United States*

v. *Weissman*, 266 U. S. 377 (1924) where this Court held that the Criminal Appeals Act bars appellate review of a judgment of acquittal, irrespective of whether it was erroneous, and that the appellate court's inquiry can go no further than to ascertain whether, in the first instance, the trial court had jurisdiction over the offense charged and the defendant. In *Weissman*, this Court, in rejecting the Government's argument that an erroneously and prematurely directed acquittal was a nullity and therefore could be reviewed and vacated, said (at pp. 378-379):

> "But we are of opinion that no such narrowing construction can be put upon the Criminal Appeals Act for the purpose of enlarging the government's right of review. The words, taken literally, refer simply to the matter of fact that there 'has been a verdict,'—not qualified by any consideration of whether it was right or wrong. . . . Furthermore, if directing the verdict was wrong, it certainly was not beyond the jurisdiction of the court. The jury were there and the prisoners before them; and, so far as jurisdiction is concerned, it did not matter whether evidence had been put in or not. We stop at the point of jurisdiction, the want of which would be the only pretext that could be offered for going behind the literal meaning of the statute."

The considerations which have led this Court in other situations to hold that Congress, in not providing for, or in taking away, the right of appeal has also precluded the extraordinary remedy of mandamus, are far more compellingly present in this case where the broader scope of the limitation on appellate review is rooted in the constitutional command that no person shall be "twice put in jeopardy." In the context of this constitutional prohibition, the clear congressional hostility to appellate review of an acquittal and the common law restrictions on the Government's criminal appellate rights, the Criminal Appeals Act

should be held to bar the circuit court from reviewing and vacating by mandamus the judgment of acquittal in the district court below.

II.

The issuance of mandamus by the court below vacating the judgment of acquittal and ordering a new trial places petitioner twice in jeopardy in violation of the Fifth Amendment.

A. The Judgment of Acquittal Directed by the District Court, Irrespective of How Improper It May Have Been, Constitutionally Bars a Retrial of Petitioner.

The writ of mandamus issued by the court below vacating the judgment of acquittal and ordering petitioner to be retried for the same offense places petitioner twice in jeopardy in violation of the Fifth Amendment.*

Historically, the primary content of double jeopardy, as incorporated in the Fifth Amendment, was the common law plea of *autrefois acquit* or *convict*, a plea which lay where there had been a verdict of innocence or guilt. The plea of *autrefois acquit*, or a former acquittal, states Blackstone in 4 Blackstone's Commentaries 335:

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* Petitioner corporation is a "person" entitled to the Constitutional safeguard under the Fifth Amendment against being "twice put in jeopardy." *United States* v. *Glidden Co.*, 78 F. 2d 639 (6th Cir. 1935); *United States* v. *United States Industrial Alcohol Co.*, 15 F. Supp. 784 (D. C. Md. 1936), *rev'd* on other grounds, 103 F. 2d 97 (4th Cir. 1939). See also *United States* v. *M'Hie*, 194 Fed. 894, 898 (N. D. Ill. 1912). This is the only reasonable construction of the double jeopardy provision of the Fifth Amendment since its rationale "that the State with all its resources and power should not be allowed to make repeated attempts to convict", *Green* v. *United States*, 355 U. S. 184, 187 (1957), or to impose successive punitive sanctions, is as applicable to a corporation as to an individual.

> "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence that when a man is once fairly found not guilty upon any indictment or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime."

This Court early declared that the double jeopardy provision contained in the Fifth Amendment, being founded upon the common law pleas of *autrefois acquit* or a former acquittal and *autrefois convict* or a former conviction, barred a second prosecution for the same offense. In *Ex parte Lange*, 18 Wall. 163, 169 (1874), this Court said:

> "The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.
>
> "Hence to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute, a plea of *autrefois acquit* or *autrefois convict* is a good defence."

After reviewing the English and American state authorities, this Court in *Ball* v. *United States*, 163 U. S. 662, 671 (1896), said:

> "As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution. However it may be in England, in this country

> a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence."

In *Kepner* v. *United States*, 195 U. S. 100 (1904), this Court, finding that Congress made applicable to the Philippine Islands a double jeopardy provision similar in wording and exact in meaning to the Fifth Amendment, held that a defendant was placed twice in jeopardy if an appellate court reviewed and reversed a trial court's verdict of acquittal for the defendant. More recently, this Court reaffirmed, in *Green* v. *United States*, 355 U. S. 184 (1957), that the Fifth Amendment prohibits review in an appellate court or a retrial after a verdict of acquittal.

Under this long line of decisions by this Court, an acquittal, whether infected with error or free of error, stands as a constitutional bar to appellate review or retrial of a defendant. As was stated by this Court in *Green* v. *United States, supra* at p. 188:

> "Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. United States v. Ball (U. S.) supra; Peters v. Hobby, 349 U. S. 331, 344, 345, 99 L. ed. 1129, 1140, 75 S. Ct. 790. Cf. Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 S. Ct. 797, 1 Ann. Cas. 655; United States v. Sanges, 144 U. S. 310, 36 L. ed. 445, 12 S. Ct. 609."

Similarly the courts in those states which have adopted the prohibition against double jeopardy either through a constitutional provision or on common law grounds, have uniformly held that a direction of a verdict of acquittal no matter how irregular or erroneous, is a bar to a second trial. See, *e.g.*, *State* v. *Taylor*, 180 Ark. 588, 22 S. W. 2d 34 (1929); *People* v. *Webb*, 38 Cal. 467 (1869); *People* v.

Terrill, 132 Cal. 497, 64 P. 894 (1901); *State* v. *Kelley*, 193 Iowa 62, 186 N. W. 834 (1922); *Commonwealth* v. *Ramey*, 279 Ky. 810, 132 S. W. 2d 342 (1939); *Commonwealth* v. *Ball*, 126 Ky. 542, 104 S. W. 325 (1907); *State* v. *Council West*, 71 N. C. 263 (1874) (common law double jeopardy); *State* v. *Thomson*, 76 N. D. 125, 34 N. W. 2d 80 (1948); *State* v. *DeFord*, 120 Ore. 444, 250 P. 220 (1926); *Belter* v. *State*, 178 Wisc. 57, 189 N. W 270 (1922).

A striking case illustrative of this fundamental principle is *Commonwealth* v. *Adkins*, 171 Ky. 299, 188 S. W. 401 (1916). Here, the prosecutor, prior to the impanelment of the jury, requested the trial court to grant a postponement because of the temporary unavailability of a key witness. The trial court refused the request. The defendant then requested that the trial proceed. The trial court directed the jury to be impaneled and when the prosecutor, because of the unavailability of his key witness, declined to proceed with the case, the trial court peremptorily instructed the jury to find the defendant not guilty.

The State appealed to the Kentucky Supreme Court under a special statutory provision. The appellate court agreed that the action of the trial court was an "abuse of discretion" and an "exceptional mistake" but nevertheless said (171 Ky. at 303-04, 188 S. W. at 402):

> "Under these circumstances, the situation was precisely the same as if the trial judge had peremptorily instructed the jury to acquit the defendant after the evidence for the Commonwealth was in or at the conclusion of all the evidence and in obedience to such instruction he was acquitted and discharged. Of course in such a state of case the judgment of acquittal would be a bar to another prosecution for the same offense.
>
> The fact that this power places great authority in the hands of the circuit judges does not furnish sufficient reason to depart from the long established rule

of practice that such a proceeding is a bar to another prosecution for the same offense. The circuit judges of the State are necessarily and properly invested with large power and discretion in directing the control and disposition of criminal cases; and if there should occasionally be a miscarriage of justice on account of an erroneous decision of a judge, an exceptional mistake like this should not be allowed to overturn a firmly settled principle in the administration of the criminal law."

There appear to be only three situations in the history of either English or American criminal jurisprudence where an acquittal in a previous trial has been held not to bar a second prosecution: where the court did not have jurisdiction over the defendant or the offense, where the indictment was so void or defective that a valid judgment could not be entered upon it or where the acquittal was procured by fraud or collusion of the defendant. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 499 (1947).

None of these situations have any relevance to the present case. Moreover, each of these three situations is sharply distinguishable from the present case because the defendants there were never subject to a valid conviction or were factually in no actual danger of appropriate punishment. In contrast, petitioner could have been validly convicted and punished and thus was in jeopardy within the meaning of the Fifth Amendment from the time the trial began.

B. Defendants Having Once Been Placed in Jeopardy Cannot Be Tried Again Even if the Judgment of Acquittal Could Be Considered a Nullity or Deemed an Order of Mistrial.

The court below recognized that a judgment of acquittal cannot be vacated irrespective of how erroneous or irregular. However, the circuit court agreed with the

Government's contention that the acquittal in the present case was void, holding that it was not only erroneous but beyond the trial court's power. The circuit court then reasoned that since the acquittal was void, a second trial would not place the defendants twice in jeopardy, relying solely upon *Mitchell* v. *Youell*, 130 F. 2d 880 (4th Cir. 1942). In that case the Fourth Circuit, in granting a writ of habeas corpus releasing a prisoner from custody, held that his state court conviction was "void" because he had been tried without benefit of counsel in violation of the Fourteenth Amendment. The court in noting that he was subject to retrial, said:

> "The defense of prior jeopardy will not protect him, for in holding that the trial was a nullity, we hold that he has not been in jeopardy under the charge. It is settled that an accused is not put in jeopardy by a void judgment of conviction, and that upon his discharge thereunder he may be again arrested and prosecuted." (130 F. 2d at 882.)

The reliance by the court below on this case is misplaced. The *Mitchell* case involved a review of a conviction at the instance of the defendant. It has been a well settled principle, since the decision of this Court in *Ball* v. *United States*, 163 U. S. 662 (1896), that the vacating of a conviction upon the appeal or other application of a defendant does not prevent him from being retried. Moreover, the court in *Mitchell*, by calling the conviction "void," merely employed the traditional language used to characterize a conviction based upon a proceeding in which a convicted defendant had been denied a constitutional right. It is only in this context of the abridgement of a convicted defendant's constitutional rights that this Court has said a trial court "no longer had jurisdiction to proceed" and that the conviction rendered could be called "void." See, *e.g.*, *Johnson* v. *Zerbst*, 304 U. S. 458, 468 (1938).

But even labelling the judgment of acquittal a nullity does not change the fact of petitioner's former jeopardy. The constitutional prohibition against double jeopardy, as developed in the decisions of this Court, means that once an accused has been put to trial he has been placed in jeopardy "whether the accused had suffered punishment or not and whether in the former trial he had been acquitted or convicted," *Ex parte Lange*, 18 Wall. 163, 169 (1874), and whether or not a verdict was rendered at the trial. *Green* v. *United States*, 355 U. S. 183, 188 (1957); *Wade* v. *Hunter*, 336 U. S. 684, 688 (1949). See also *Gori* v. *United States*, 367 U. S. 364, 371-72, n. 3 (dissenting opinion).

Petitioner was actually on trial before a competent tribunal for eight days. A valid conviction could have resulted and petitioner stood in danger of punishment. Therefore, petitioner was clearly in "jeopardy" within the meaning of the Fifth Amendment during all this time, and in fact, from the moment the jury was impanelled on September 8, 1960 until the trial was terminated and the jury excused on September 20, 1960.*

The Government apparently recognizing that calling the judgment of acquittal a nullity does not by itself dispel the constitutional bar of double jeopardy, argues that the judgment of acquittal should be deemed an order of mistrial which the petitioner solicited and consented to.**

Factually this Government theory is untenable. Petitioner did not move for a mistrial; petitioner moved for an acquittal or alternatively to strike Rosenholm's testimony; and petitioner would vigorously have opposed any motion

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* Jeopardy is normally said to attach when a jury is impanelled. *Cornero* v. *United States*, 48 F. 2d 69 (9th Cir. 1931).

** Gov't Br. below, pp. 33-39.

for a mistrial. The trial court did not have before it any request for a mistrial, did not grant a mistrial, and did not intend to grant a mistrial. Moreover, it would have been improper, in the posture the case had assumed during the eight days of trial, for the trial court to have taken such action.

But *arguendo* adopting the Government's theory that the judgment of acquittal should be considered as equivalent to an order of mistrial, petitioner still cannot be constitutionally subjected to a second prosecution.

The guiding principle which has been followed by this Court in determining whether a trial court's discharge of a jury prior to a verdict permits the accused to be subjected to a second trial notwithstanding his having been in jeopardy at the first trial, was laid down in *United States* v. *Perez*, 9 Wheat. 579 (1824). In *Perez*, after the first trial had resulted in a deadlocked jury, this Court held a second trial was permissible, saying (at p. 580):

> "... We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. . . . "

In subsequent cases this Court and the lower federal courts have applied the principle enunciated in *Perez* to permit a second trial only where the first trial was terminated before verdict because of "urgent circumstances" and the ends of justice required the mistrial. See, *e.g.*, *Simmons* v. *United States*, 142 U. S. 148 (1891) (discovery of juror's bias); *Thompson* v. *United States*, 155 U. S. 271 (1894) (disqualification of juror); *Wade* v. *Hunter*, 336 U. S. 684 (1949) (military exigencies causing discontinuance of trial); *United States* v. *Potash*, 118 F. 2d 54 (2d Cir. 1941) (juror ill). However, where a mistrial is declared for the purpose of permitting a prosecutor to improve his case, or even to obtain new witnesses, a second trial is barred. *Cornero* v. *United States*, 48 F. 2d 69 (9th Cir. 1931); *United States* v. *Watson*, 28 Fed. Cas. 499 (No. 16651) (S. D. N. Y. 1868). See *Green* v. *United States*, 355 U. S. 184, 188 (1957).

Last term, in *Gori* v. *United States*, 367 U. S. 364 (1961), this Court was faced with a situation where, on the first day of a trial, the trial court had, on its own motion and without the consent of the defendant, declared a mistrial. The majority of this Court, acting on the premise that the mistrial had been clearly granted "in the sole interest of the defendant," held that the subsequent trial of the defendant was not constitutionally barred. The minority felt that there was not such "imperious necessity" for the mistrial as to permit a second trial. However, no sanction was given by this Court in *Gori* to voiding the constitutional protection against double jeopardy where the effect of the mistrial was other than helpful to the defendant. In fact the majority opinion intimated that where the trial is terminated under circumstances where the case is "going badly" for the prosecution thus "affording it another, more

favorable opportunity to convict the accused" a second trial would be offensive to the Fifth Amendment. The same principle was given explicit recognition by this Court in *Green* v. *United States*, 355 U. S. 184, 188 (1957), where it was said that double jeopardy would apply if a trial court subjects "a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict."

If the trial court's direction of an acquittal in the present case is considered to be a direction of a mistrial, it is clear that the trial court would then have been giving the Government a second and more favorable opportunity to convict the petitioner. For, there is no question that the trial in the district court was "going badly" for the Government as most strikingly evidenced by the trial judge's stated belief that an ineradicable unfavorable impression had been created by the Government witness Paliatto and that in his opinion the jury would not bring in a conviction. In a new trial the Government witnesses will be "educated" and the forewarned prosecutor can, on his direct examination, blunt the edge of cross-examination, including defendants' use of the witnesses' prior inconsistencies. Thus, at a second trial it is most unlikely that the impact made on the jury by the conflicting and inarticulate testimony of the Government witnesses, which had induced adverse comments by the trial judge, can be recreated.

The Government, notwithstanding the realities of the situation prior to the direction of acquittal, argued in the court below that defendants, by improperly moving for an acquittal, must be deemed to have waived the defense of double jeopardy.* Pursuant to the Government's theory, defendants' action in moving for an acquittal was analogous to their taking an appeal from a conviction, such as in

* Gov. Br. below at pp. 36-39.

Ball v. *United States*, 163 U. S. 662 (1896), or to their consenting to a mistrial, as in *United States* v. *Harriman*, 130 F. Supp. 198, 204 (S. D. N. Y.), *appeal dismissed* 219 F. 2d 918 (2d Cir. 1955). However, as previously discussed, petitioner did not move for a mistrial and in the posture of the trial such a motion was unthinkable.

The very argument the Government here advances—that a request for a direction of an acquittal which is erroneously granted by the trial court waives the protection of double jeopardy—was also made by a state attorney general and ably answered by the state's highest court in *Commonwealth* v. *Ball*, 126 Ky. 542, 104 S. W. 325 (1907). In this case, the State contended that double jeopardy was waived where a trial court, on a motion for acquittal by the defendant, had erroneously granted the acquittal. The court, in rejecting this theory, said (126 Ky. at 547, 104 S. W. at 326):

> ". . . If the defendant may be tried again when he has been acquitted upon a peremptory instruction asked by him, the same rule should be applied when the instruction, though not in form peremptory, is equivalent to a peremptory instruction, or where the rulings of the court in the admission or rejecting of evidence are equivalent to a peremptory instruction. It is incumbent upon the court to give the jury the whole law of the case, and if the defendant had remained quiescent it would have been the duty of the court to decide the question which was raised by him and instructed the jury upon it. The Constitution guarantees the defendant counsel in the management of his case. The right to the assistance of counsel would be a vain thing if the counsel might not raise such questions as they deemed proper. The guaranty that a person shall not be put twice in jeopardy would amount to but little if he could be tried a second time wherever his acquittal was due to an error of the court committed upon his motion. It is immaterial that the

> circuit judge gave the peremptory instruction on the ground that the court was without jurisdiction. We cannot go into the reasons which actuated him. The fact is that under the instructions of the court the jury have regularly found the defendants not guilty, and they cannot be further prosecuted."

Moreover, decisions of this Court touching on other constitutional rights make it clear that the type of waiver or consent which the Government here urges cannot be implied where the result will be the destruction of petitioner's constitutional right not to be "twice put in jeopardy." *E.g., Green* v. *United States*, 355 U. S. 184, 191-197 (1957); *Glasser* v. *United States*, 315 U. S. 60, 70 (1942).

Thus, whether or not the acquittal was erroneous, or the trial court without power to have directed the acquittal or the judgment of acquittal be considered merely an order of mistrial, petitioner was in jeopardy during the first trial below and cannot constitutionally be made to undergo the oppression and harassment of a second trial under circumstances more favorable to the Government.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals for the First Circuit should be reversed and the writ of mandamus quashed.

Respectfully submitted,

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APPENDIX A

STATUTES AND FEDERAL RULES INVOLVED

Statutes

28 U. S. C., §1651—Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law . . . . June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, §90, 63 Stat. 102.

18 U. S. C., §3731—Appeal by United States

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jursidiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court. June 25, 1948, c. 645, 62 Stat. 844, amended May 24, 1949, c. 139, §58, 63 Stat. 97.

Federal Rules of Criminal Procedure

Rule 29—Motion for Acquittal

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

* * * * *

Rule 37(a)—Taking Appeal

. . .

(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.